No. 82-1931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELI MESIROW AND THOMAS MORRIS,
Petitioners,

VS.

PEPPERIDGE FARM, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On Behalf of Respondent

QUESTIONS PRESENTED

1. In determining whether there were material facts genuinely in dispute on a motion for summary judgment, did the courts below properly disregard sham issues?

2. Under the Sherman Act, did Pepperidge Farm lawfully set the wholesale price of its biscuit products:

(a) during Fair Trade, when Pepperidge Farm sold to retailers only through distributors;

(b) after Fair Trade, when

(1) Pepperidge Farm set its wholesale price only to its direct billed customers, *i.e.*, chain stores which requested central billing by Pepperidge Farm and which distributors were free to solicit to become distributor customers, billed by the distributor at his or her prices; and

(2) Pepperidge Farm products were sold through distributors on a true consignment, with Pepperidge Farm bearing all significant risks of loss?

3. Did Pepperidge Farm violate the Sherman Act by marking its biscuit products with a suggested retail price, which retailers were free to and did change at will?

4. Under the Sherman Act, did Pepperidge Farm lawfully permit its distributors to sell portions of their exclusive territories to others?

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Respondent Pepperidge Farm[1] opposes the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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[1] Petitioners are Eli Mesirow ("Mesirow") and his half-brother, Thomas Morris ("Morris"), former distributors of certain biscuit products of Respondent Pepperidge Farm, Incorporated ("Pepperidge Farm"). Mesirow and Morris will at times be referred to as "Mesirow/Morris."

"Pet." refers to the Petition for a Writ of Certiorari.

"ER" is the Excerpt of the Record filed by petitioners in the Ninth Circuit, cited to the page number as stamped on Appellants' Excerpt of Record and the line numbers where appropriate. Page numbers beginning with ("S") are in a Supplemental Excerpt filed in the Ninth Circuit. The Clerk's Record on Appeal is designated "CR," followed by the number indexed on the Clerk's docket sheet and page numbers in the document as filed in the district court. Within such descriptions, depositions will be abbreviated "dep.", declaration "decl." and affidavit "aff."

Appendix is abbreviated "App."

All emphasis in quotations has been added.

OPINIONS BELOW

The district court's opinion is published at 1981-2 CCH Trade Cases ¶ 64.292 and printed at App. B; the Ninth Circuit opinion is published at 703 F.2d 339 and printed at App. C and D.

STATUTES INVOLVED

In addition to the statutes listed in the Petition, the case also involves California's Fair Trade Law, codified in California Business & Professions Code, §16902, printed at App. A.

COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the case is, as in both courts below, a jumble of "unsupported assertions, improper attempts to alter or ignore sworn deposition testimony, or factual distinctions without substantive impact" (App. B-11). The Petition ignores and directly contradicts petitioners' sworn cross examined testimony in order to "raise sham issues" (App. C-9); it also "distorts and exaggerates" the extensive evidentiary record in order to create the illusion of reviewable issues (*See* App. B-14).

Each of the following facts was plainly established by the record and is not fairly in dispute, having been proven either by (a) Mesirow's or Morris's admissions, or (b) by other competent evidence uncontradicted by competent admissible evidence.

1. The Parties.

Respondent Pepperidge Farm is a Connecticut corporation engaged in the business, among others, of baking biscuit products and selling them on consignment through distributors (ER 1048:29-32).

Petitioner Mesirow was a distributor of Pepperidge Farm biscuit products from January, 1970 until May 13, 1978, when he was terminated for cause as a result of his failure to pay his bills (Mesirow dep., ER 631:27-632:23, 758:9-16, 758:28-759:21, 764:26-765:12, 777-789, 870, 871).

Petitioner Morris was a distributor of Pepperidge Farm biscuit products from April 25, 1970 until August, 1978, when Morris sold the remainder of his franchise to another (ER 001:27-32; Morris dep., ER 933:14-17, 959-968). Mesirow and Morris considered themselves to be partners and operated their distributorships jointly (Mesirow dep., ER 675:28-677:1; Morris dep., ER 915:17-917:11).

2. Definitions.

Biscuit products are cookies and crackers (ER 1049: 1-4).

Dry products are stuffing and croutons (ER 1049:1-4. Mesirow dep., ER 751:15-16). Dry products, as well as biscuits, were "consigned products" under the terms of Mesirow's and Morris's Consignment Agreements with Pepperidge Farm (*e.g.*, Mesirow decl., ER 088, 089, 091.) Their suggestion to the contrary (Pet. 5) has no support in the record.

Fresh coded shelf life is the time during which Pepperidge Farm biscuit products, which are baked without preservatives, can be considered "fresh" on retail shelves. The fresh coded shelf life from date of delivery to the distributor is 12 weeks for biscuit products, 20-25 weeks for croutons and 52 weeks for stuffing. (ER 1049:5-13; Mesirow dep., ER 647:10-27; Morris dep., ER 948:15-16)

Overcode or "stale" items are biscuit and dry products whose fresh coded shelf life has expired (ER 1049:11-13. Mesirow dep., ER 647:25-27).

Chain account is any person, firm, corporation or other legal entity that owns or operates three or more retail stores under a single trade name (ER 1051:14-24; Mesirow dep., ER 636:22-27; 723:10-15; 724:2-14; Morris dep., ER 933:2-934:25, 961, 971).

Direct billing accounts are those chain accounts which have requested direct billing by Pepperidge Farm at the chain's regional or headquarters level, at a price applicable to product delivered to all stores in an area. Direct billing accounts are billed by and pay Pepperidge Farm directly for product delivered to their stores, and the Pepperidge Farm distributor is paid a commission on the sale calculated as a percentage of the wholesale price. Direct billing accounts are customers of Pepperidge Farm. (Mesirow dep., ER 636:28-637:3; Morris dep., ER 933:3-934:5, 960 ¶3, 961 ¶8; ER 554:3-19; 999-1001. Mesirow decl., ER 1058:18-25; 1051:14-1052:32)

Distributor account is a store billed by a distributor at the distributor's price. It can be a chain account, such as Longs, or an individual store. (Mesirow dep., ER 638:14-19, 724:2-14, 725:25-726:2, CR 219, 410:27-411:18; Morris dep., ER 916:25-27, 920:10-24. ER 561-562; 571:16-22. ER 1053:25-1054:18)

Chain accounts were either direct billing accounts or distributor accounts. There is no competent evidence of a "*hybrid chain account*" (Pet. 13). *See* App. C-8, C-9.

3. Pepperidge Farm's Small Share of the Biscuit and Dry Products Market.

In 1975, Pepperidge Farm's national share of cookies and crackers was somewhat less than 3%; its 1975 share of the San Francisco cookies and crackers market was somewhat less than 2.5% (ER 1050:11-20). Pepperidge Farm's share of the United States market for cookies and crackers by 1980 was only 3.64%; its 1980 share of the San Francisco market was 3.2%. Mesirow/Morris's claim that Pepperidge Farm "is a dominant company in the premium cookie business" (Pet. 6) is totally unsupported by the unauthenticated figures which petitioners cite.[2]

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[2] Mesirow/Morris's claim that Pepperidge Farm products are "prominently displayed" (Pet. 6) is both irrelevant and unsupported. No evidence compares Pepperidge Farm displays with those of other manufacturers.

4. Pepperidge Farm Charges Its Wholesale Price Only to Its Customers, i.e., Those Chains Which Have Requested a Direct Seller-Purchaser Relationship With Pepperidge Farm.

Certain chains request and others require direct billing at a single price for deliveries of product to the chain's stores, regardless of which distributor might make the delivery or which store receives it. Since the repeal of Fair Trade, Pepperidge Farm has established direct seller-purchaser relationships only with such chains. Sales calls are made on these accounts by Pepperidge Farm employees, who also survey and monitor the stores to assure proper service and attempt to obtain greater product authorization, shelf space and promotions. Pepperidge Farm trains its distributors and their employees/delivery persons to properly service Pepperidge Farm's direct customers, and Pepperidge Farm employees are always available to take over a distributor's route, temporarily as needed because of sickness or other absence, in order to assure that service to its customers is maintained. (ER 1051:9-32, Mesirow dep., ER 633:7-14, 640:5-641:22, 645:27-646:2, 663:1-664:25, 692:1-27, 776:5-13; Montreal dep., ER 884:14-16, 885:14-20, 886:2-12, 887:8-11, 888:10-27. ER 1001) Petitioners' statement to the contrary (Pet. 35) is unsupported.

Mesirow/Morris's experience after they ceased to be Pepperidge Farm distributors confirms that certain chains require central billing at one price as a condition of doing business, as Richard Montreal, who obtained authorizations for their non-Pepperidge Farm products, testified (ER 883:14-20, 886:2-12). Mesirow/Morris distributed Sunshine, Little Dutch Boy, Neldam and several other cookies (Mesirow dep., ER 641:4-22; Morris dep., ER 905:8-12). In order to accomodate the demands of Safeway and other chains that one presentation only of a product be made and at one price, Mesirow and Morris would meet with other sellers of these products and horizontally agree upon a single price to be presented to a chain. One distributor would then make the sales call on behalf of all. (Morris dep., ER 909:14-911:9, 912:8-11; Mesirow dep.,

ER 634:19-26, 635:7-11, 642:27-643:4; Montreal dep., ER 886:2-19)[3]

Pepperidge Farm pays for all promotional advertising on its biscuit and dry products sold at its direct chain customers' stores. Promotional product is sold to direct customers at a discount from the stated wholesale price with the distributor receiving his or her commission as a percentage of the non-discounted wholesale price (ER 1052:9-32). Mesirow and Morris never paid for a promotion on Pepperidge Farm product delivered to a Pepperidge Farm direct customer (Mesirow dep., ER 665:5-8; S004:6-8).

After the repeal of Fair Trade, Pepperidge Farm informed its distributors that it would no longer attempt to control in any way the wholesale prices charged by distributors to accounts which the distributors billed. For Pepperidge Farm's direct billing accounts, distributors, including Mesirow/Morris, would be paid a commission based on deliveries to such stores in their territories, and a new consignment agreement was structured accordingly (ER 1051:5-13). For sales made to Pepperidge Farm's direct customers, the distributor acts as a commissioned deliveryman (ER 1051:25-1052:8. Mesirow dep., ER 693:17-694:28, 695:16-696:5, 696:27-697:6). Some distributors, including Mesirow/Morris, in turn hire their own commissioned deliverymen to deliver product to Pepperidge Farm's and the distributor's accounts (Mesirow dep., ER 680:15-22, 748:15-22).

Only those chain stores which request direct billing by Pepperidge Farm are billed and priced by Pepperidge Farm. Many chain stores do not make such a request; these are billed and priced by Pepperidge Farm's distributors and are the distributor's customers. The choice is the chain's. For example, in the San Francisco area, Longs Drugs, Pay Less Drugs and Seven/Eleven have been distributor customers, not Pepperidge

[3] In the district court, Pepperidge Farm argued that Mesirow/Morris had suffered no antitrust injury under *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) and *Kestenbaum* v. *Falstaff Brewing Corp.*, 575 F.2d 564 (5 Cir. 1978), *cert. denied*, 440 U.S. 909 (1969). Mesirow and Morris would have been able to receive a higher price from chains requesting direct billing only as result of a horizontal price fixing agreement among distributors. The district court did not reach the issue (B-17).

Farm customers. In Sacramento, Davis, Modesto and Fresno, Safeway and Albertson's are distributor customers. (ER 1051:25-1053:24; 1314:6-24; 1320:6-25; 1326:6-24; 1333:1-25; 1340:6-24; 1346:1-20; 1352:6-23; 1359:6-24; 1365:6-24; 1371:1-19; 1377:6-24; S014:6-24; 1019-1023; 561-562; 571:16-22; 592:12-18, 539:1-24)

Petitioners falsify the record at Pet. 47-48 where they list ten Bay Area distributors as not directly billing chain accounts in their territories. Each of these Pepperidge Farm distributors swore that there were chain stores in his territory which are his customers and are charged whatever wholesale price he chose to charge that the store would accept. Amadon: Longs, Deluxe Foods (ER 1314); Cox: Longs, Payless, United Markets, A & B Markets, Roger Wilco Markets, Seven/Eleven (ER 1320); Ennor: Payless, Longs (ER 1326); Garcia: Longs, Payless, Big T, Lairds, Walgreens (ER 1333); Gee: Manor Markets, Longs, Payless, Key Markets (ER 1340); Hermann: Longs, Albertsons, Safeway, Cala Foods, Q.F.I. Markets, Walgreens, Co-Op (ER 1346); Karsh: Payless (ER 1352); Leavitt: Longs, Payless, Bill's, Walgreens (ER 1359); Lloyd: Longs, Walgreens (ER 1365); Nicholson: Payless, Longs, Bill's, Food Fair, Walgreens, Food Villa (ER 1371); Pierce: Shop 'n' Save, Farmers Market, Longs (ER 1377).

Contrary to petitioners' claims (Pet. 12-13; 15) there is no evidence that Pepperidge Farm selects or "reserves" some chains to be direct billing customers. After Fair Trade, any distributor was free to solicit any chain to become the distributor's own customer at the distributor's own price. Mesirow/Morris's largest account, Longs, was a chain which was their customer, billed by them at a price which they chose. (Mesirow dep., ER 638:14-19, 724:2-14, 725:25-726:2, 729:21-24. ER 561-562; 574:20-576:20. ER 1051:25-1054:18; 1314:6-24; 1320:6-25; 1326:6-24; 1333:1-25; 1340:6-24; 1346:1-20; 1352:6-23; 1359:6-24; 1365:6-24; 1371:1-19; 1377:6-24; S014:6-24. CR 345, 1019-1023; 561-562; 571:16-22; 592:12-18, 593:1-24)

5. Mesirow and Morris Billed All Their Accounts —Chain and Independent—At Mesirow/Morris's Wholesale Prices.

Pepperidge Farm has no interest or involvement in the wholesale pricing of any biscuit product delivered to distributor customers (ER 1002, 1051:5-13, 1053:25-1054:30). After Fair Trade, Mesirow/Morris had the option to, and did bill their direct customers at wholesale prices different from those charged by Pepperidge Farm (Mesirow dep., ER 638:14-19, 639:9-21, 729:16-24). After the repeal of Fair Trade, Pepperidge Farm never told Mesirow/Morris what wholesale price to charge Longs, their largest chain distributor account, or any other of their distributor accounts (Mesirow dep., ER 730:19-731:6. ER 574:20-576:20. ER 1051:5-13). After the repeal of the Fair Trade, Pepperidge Farm did not communicate its wholesale prices to Longs or any other retailer not its direct customer (ER 577:8-15; Mesirow dep., ER 731:23-28. ER 1053:25-1054:18).[4]

Mesirow testified at deposition about pricing to stores which he billed such as Longs:

Q. When you sold product to stores that you billed, did you ever charge them a price different than that on some list given you by Pepperidge Farm?

A. Always.

Q. You did?

A. Yes.

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[4] Mesirow/Morris assert that Pepperidge Farm sent its price list to their chain customer Longs. The only "evidence" on the point relates to times before 1976, during Fair Trade. Mesirow/Morris testified at deposition that their price to Longs was chosen by them and different from the Pepperidge Farm price. Mesirow also testified that he never attempted to charge Longs a price different from that charged by Pepperidge Farm to its direct accounts (*See*, App. B-12). The only genuine dispute below was as to when Mesirow chose to testify truthfully under oath. In any event, "[T]he dissemination of price information is not itself a *per se* violation of the Sherman Act." *United States v. Citizens & Southern Nat. Bank*, 422 U.S. 86, 113 (1975); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9 Cir. 1982).

(Mesirow dep. CR 216, 62:14-19)

Mesirow was asked specifically about his pricing to Longs:

Q. Did you ever charge the accounts that you billed a charge different than the wholesale price that Pepperidge Farm was charging to its accounts?

A. Yes.

Q. And did you ever charge Longs a different price?

A. Yes.

(Mesirow dep. CR 219, 418:25-419:2; 419:12-15)

Mesirow's "always" charged "stores that [he] billed a price different than that on some list given [him] by Pepperidge Farm" (Mesirow dep., CR 216, 62:14-19).

6. Pepperidge Farm Biscuit and Dry Products are Delivered to Distributors on Consignment, with Pepperidge Farm Bearing All Risks of Loss.

Pepperidge Farm consigns its biscuit products to its distributors, bearing all risks incident to ownership until the time the product is delivered to a retail store (ER 1054:19-30, ER 989-990):

a. It pays any and all applicable inventory and property taxes (ER 1054:19-30; Mesirow dep., ER 658:1-659:10; 698:28-699:2).

b. It carries all insurance against theft, loss or damage while its product is in the possession of its distributors (ER 1054:19-30; 1081:18-1082:1).

c. It bears all risk of theft, loss or damage. For example, if product is stolen from a distributor, Pepperidge Farm will bear the entire loss. In April, 1975, virtually all Pepperidge Farm product in the Mesirow/Morris warehouse was "stolen."[5] Pepperidge Farm bore that entire loss, in the amount of $21,386.88, of which insurance covered only $11,386.88. (ER 1081:18-1082:1, ER 989; Mesirow dep., ER 685:28-686:2;

[5] "Stolen" placed in quotation marks because Mesirow/Morris's brother, Reny Morris, testified that the "theft" was set up by Mesirow as a way to defraud Pepperidge Farm (R. Morris dep., ER 891:12-14; 896:27-897:28).

687:18-24; 688:1-17; 689:7-11; 690:7-28; 707:13-27; 828; Morris dep., ER 944:6-10; 945:13-15; Reny Morris dep., ER 891:12-14; 896:27-897:28) Neither Mesirow nor Morris bothered to estimate the amount of product that had been "stolen" from their warehouse because "it was [Pepperidge Farm's] product." Nor did they declare the loss on their income tax returns. (Mesirow dep., ER 685:28-686:2, 687:18-24, 688:1-17, 689:7-11, 690:7-28, 698:4-9, 698:25-699:12, 705: 22-707:27; Morris dep., ER 944:6-10, 945:13-15; 989; Reny Morris dep., ER 891:12-14, 896:27-897:24, ER 989). Indeed, Mesirow/ Morris never paid attention to the amount of product in their warehouse because "it was [Pepperidge Farm's] product" (Mesirow dep., ER 705:22-706:28, 707:13-27, 708:24-28, 709:20).

d. Pepperidge Farm worked with and trained Mesirow/Morris's "independent contractors" who were delivering Pepperidge Farm product (Mesirow dep., ER 663:8-664:25).

e. Pepperidge Farm surveyed Mesirow/Morris's territories to determine the number of stores into which Pepperidge Farm product could be sold; Mesirow/Morris themselves made no such surveys (Mesirow dep., ER 669:27-671:21. ER 1052:9-32). Indeed, Mesirow/Morris relied completely upon Pepperidge Farm for information on "what was going on" in the stores of Pepperidge Farm's direct customers in their territories (Mesirow dep., ER 736:23-737:25, 738:5-739:1).

f. Pepperidge Farm paid for all promotions for sale of its biscuit products in those stores billed by Pepperidge Farm as its direct customers (Mesirow dep., ER S004:6-8, S005:19-26, 672:1-28, S006:1-9, S007:15-20. ER 1052:9-32).

g. Pepperidge Farm bears all risk and the considerable expense of billing its direct customers and of carrying their accounts receivable (ER 1053:1-24; 1080:30-1081:17).

7. The So-Called "Risk of Stales" Is Illusory. Overcode Returns Are Non-Existent with the Exercise of Ordinary Prudence.

Pepperidge Farm biscuit and dry products are baked without preservatives and will not remain fresh indefinitely (see p. 3, above). Under his or her Consignment Agreement with Pepperidge Farm, a distributor agrees to supply stores with fresh product and remove from shelves product on which the fresh code has expired (*e.g.*, Mesirow decl., ER 068). Such removal insures that customers purchasing Pepperidge Farm product find it to be fresh, thereby preserving Pepperidge Farm's reputation, to the benefit of both Pepperidge Farm and its distributors. (ER 594:6-20; 1310:1-10; 1316-1-10; 1322:1-10; 1329:1-10; 1336:1-10; 1342:1-10; 1348:1-10; 1355:1-10; 1361:1-10; 1367:1-10; 1373:1-10; S010:1-10; 1049:14-29)

The 12, 20 and 52 week fresh coded periods provide a distributor with ample time to insure retail sale of Pepperidge Farm biscuit and dry product. Proper business management and care for the product entirely eliminates overcode returns. Most Pepperidge Farm distributors have little or no return of overcoded items, with West Coast distributors removing less than 1% of Pepperidge Farm biscuit and dry product from retail shelves for being out of code. (ER 562:566; 595:1-598:12, 599:4-12, 600:17-601:15, 602:2-7, 603:1-23; 643-644, 620-621; 877:22-28, 878:10-28, 879:8-21; 1003-1010, 1016-1017; 1035), 1310:11-1313:16; 1316:11-1319:16; 1322:11-1325:16; 1329:11-1332:16; 1336:11-1339:16; 1342:11-1345:16; 1348:11-1351:16; 1355:11-1358:16; 1361:11-1364:16; 1367:11-1370:16; 1373:11-1376:16; S010:11-S013:16) Morris admitted, "A wise businessman can eliminate stales off the shelf" (Morris dep., ER 941:14-18).

The minimal amounts of overcoded Pepperidge Farm product that is removed from shelves can be and is sold by distributors to "thrift stores"—stores specializing in the sale of out-of-code products. Pepperidge Farm has continuously operated "thrift stores" in Southern California and throughout the

United States which accept overcode product from distributors, who are then given full credit for their cost of the product. (ER 1030-1033, 1035-1045; 559-560; 987, 989-990, 1016-1017)

Mesirow/Morris sent overcoded product to Pepperidge Farm thrift stores until 1976, when they opened their own thrift store, selling overcode biscuit product at a profit (Mesirow decl., ER 1060:29-32, CR 345, Mesirow dep., ER 716:17-19, 741:14-24, 767:9-17, 768:18-769:5, 769:17-23, 772:18-28, 773:21-25; Morris dep., ER 942:13-20). After closing their thrift store, Mesirow/Morris again shipped overcode product to Pepperidge Farm thrift stores (Mesirow dep., ER 742:8-12, 846).

Pepperidge Farm will take back any product delivered to distributors in a damaged or "short coded" condition, *i.e.*, with less than a full fresh shelf life. It will also take back product delivered to a distributor in error. On occasion, Pepperidge Farm has introduced a new product which has not sold well. It has customarily accepted returns of this product even though it may have been out-of-code. (Mesirow dep., ER 701:28-702:9, 703:4-7, 703:23-26, 743:18-21, 763:18-28, 872. ER 996-998, 1007; 599:13-600:2. ER 1313:17-31; 1319:17-31; 1325:17-30; 1332:14-27; 1339:18-31; 1345:14-27; 1351:14-27; 1358:17-31; 1364:17-30; 1370:14-27; 1376:17-30; S013:17-30)

Pepperidge Farm has instructed its distributors, including Mesirow/Morris, to refuse to accept short coded product and to return it for credit. Mesirow/Morris ignored these instructions. (Mesirow dep. ER 770:12-24, 872. ER 563)

8. Mesirow's and Morris's Overcoded Product Returns Resulted Solely from Their Shoddy Business Practices and Sales to Their Direct Customers.

The bulk of Mesirow/Morris's deliveries were to Longs stores on promotional "ads" and "tabs" (Morris dep., ER 923:27-925:6). Mesirow and Morris used their own discretion

in determining how much product they would deliver to Longs (Morris dep., ER 920:10-21, 921:8-922:24, 925:3-20, 929:10-13). Mesirow/Morris could have guided Longs in its purchases so that large amounts of product would not remain unsold (Morris dep., ER 925:28-926:6, 927:9-18, 928:8-12, 941:14-18). They simply failed to do so (Mesirow dep., ER 745:3-8, 745:28-746:11; Morris dep., ER 925:3-20).

Product which Mesirow and Morris picked up from Longs as unsold was often still within the fresh coded period, though with a shorter time remaining. Mesirow and Morris redistributed this product to other stores and with proper management, it could have been sold before the expiration of the fresh coded period (Morris dep., ER 925:12-24, 939:7-24, 940:8-14; ER 948:15-26).

Much of Mesirow/Morris's overcoded product went out of code in their warehouse, sitting there for from 4 months to a year without even being put on the market (Mesirow decl., ER 1059:31-1060:2. Morris dep., ER 936:28-937:12; Mesirow dep., ER 733:23-734:1). Mesirow/Morris attribute their overcode product to Pepperidge Farm ordering "quotas" during promotions (Pet. 49). The claim is belied by petitioners' own deposition testimony and the declarations they filed on summary judgment. Pepperidge Farm *never* forced Mesirow/Morris to over-order on promotions; they over-ordered because it made them feel like "the big guy" (Morris dep., ER 949:2-950:8; Morris dep., ER 950:18-21). Mesirow/Morris were at all times free to order whatever quantities they chose (Mesirow dep., ER 717:11-23, 718:7-9, 718:22-719:2, 719:14-720:6, 733:23-734:1, 735:21-736:7, 760:2-761:5, 761:23-762:5; Morris dep., ER 931:17-932:17, 936:28-937:10, 951:16-952:12, ER 562-564; 595:1-27). Mesirow/Morris simply neglected to change their standard order after selling portions of their franchises (Morris dep., ER 930:21-28, 931:17-932:24, 936:28-937:12, 951:16-952:11; Mesirow dep., ER 717:7-23, 718:7-9, 718:22-719:2, 719:14-720:6, 735:21-736:7, 760:2-761:5, 761:23-26, 762:1-5).

Mesirow/Morris's poor business practices caused whatever overcode problems they may have had:

a. They never knew how much product they had in their warehouse (Mesirow dep., ER 708:24-28, 709:20).

b. They never kept records of how much product was received from Pepperidge Farm at their warehouse (Mesirow dep., ER S008:12-15).

c. They never kept any records of which products were and were not "moving" in stores they serviced (Mesirow dep., ER 700:7-28, 710:20-711:15; Morris dep., ER 947:10-16).

d. Mesirow, who did the ordering for himself and Morris (Morris dep., ER 930:16-20), never reviewed credit slips to see what products were being returned as out of code (Mesirow dep., ER 744:7-19).

e. Such a review would not have been helpful in any event because credit slips they prepared for out of code items did not reflect the actual products for which Mesirow/Morris issued credits (Mesirow dep., ER 747:10-22).

f. Mesirow, when ordering, often "did not have time" to look at his weekly inventory reports so that he would know what products ne already had in stock (Mesirow dep., ER 721:17-21, 722:8-23).

g. When Mesirow filled out his consigned inventory reports for himself and Morris and sent them to Pepperidge Farm, these reports never accurately reflected actual product in their inventory (Mesirow dep., ER 750:14-25, 752:18-20, 753:4-754:16).

9. Sales During Fair Trade.

While Fair Trade laws were in effect, Pepperidge Farm entered into Fair Trade Agreements with Mesirow and Morris under which each agreed that Pepperidge Farm had the right to determine the wholesale price of Pepperidge Farm product delivered by him, so long as the law permitted (Mesirow dep., ER 632:4-23, 644:8-18, 659:24-28, S003:1-9, 777, 790, 804, 816; Morris dep., ER 933:2-934:17, 961, 972. ER 1051:1-4).

Pepperidge Farm does no mail order business. A separate company, Pepperidge Farm Mail Order Company, Inc. ("Mail Order"), a wholly owned subsidiary of the Campbell Soup Co., was incorporated in 1974. Mail Order has its own officers, offices and financial records separate and distinct from those of Pepperidge Farm. (ER 1055:1-18)

Mail Order has sold only products which are called "specialty items." Its product line primarily consists of chocolate candies, nuts, soap, soups, cheese, syrups and jellies. Mail Order does sell some cookies, but these are packaged specially for Mail Order in distinctive gift packs: tins, jars, baskets and backpacks. Cookies packaged in Mail Order's distinctive packs are sold by mail directly to the public and are not sold to wholesalers or retail stores in direct competition with the distributors. (ER 1055:1-18)

10. Retail Stores Have Discretion to and Do Change Pepperidge Farm's Suggested Retail Price.

Pepperidge Farm biscuit products come with a preprinted retail price. This is a suggested retail price only which retail stores are and have been free to change if they choose; stores customarily do change this suggested retail price. (ER 1314:1-5; 1320:1-5; 1326:1-5; 1332:28-32; 1335:1-5; 1345:28-32; 1352:1-5; 1359:1-5; 1365:1-5; 1370:28-32; 1377:1-5; S014:1-5. Mesirow dep., ER 650:9-12, 651:6-18, 652:14-15, 654:24-655:2, 683:22-684:3; Morris dep., ER 946:1-12. CR 345, 1002-1003) Pepperidge Farm instructed distributors to carry the necessary equipment to effect any price change a retail store requested (Mesirow dep., ER 653:19-654:1; Morris dep., ER 946:1-12). Both courts below correctly disregarded Mesirow/Morris's unsupported assertions to the contrary, as at Pet. 10 (App. B-12; App. C-9).

11. Pepperidge Farm Does Not Force Its Distributors to "Split" or Sell-Off Portions of Their Territories.

Pepperidge Farm distributors have exclusive franchise territories. They have an exclusive right to solicit and sell to

distributor accounts within these territories and an exclusive right to deliver upon commission to stores of Pepperidge Farm customers within these territories (CR 345, Mesirow dep., 627:27-628:7. CR 345, 551:24-26, 552:15-23). Pepperidge Farm believes that by granting exclusive territories it ensures that its product will be aggressively marketed against products of other manufacturers (CR 346, 1050:21-32).

Pepperidge Farm's interest is to have profitable distributors and to increase and maximize sales in every distributor's territory (ER 993-995, 1011-1013; 556:24-26; 578:4-14, 579:24-26, 581:14-27). In no event does Pepperidge Farm require a distributor to sell or "split" any part of his or her territory (ER 584:14-19, 585:19-586:16; 993-995, 1012-1015). Where splits occur, Pepperidge Farm expects and has experienced that not only will a distributor realize a capital gain on the sale, but he or she will also realize greater profits from the remaining, better serviced, territory (ER 555:17-19; 578:6-13, 582:17-24; 1012-1015).

No evidence supports petitioners' claim that Pepperidge Farm sales managers "were ordered . . . to obtain route splits" (Pet. 18). The evidence showed only that sales managers set their own objectives and were praised if their goals were attained (Montreal dep., ER 1440:15-28. ER 993, 1013) and that distributors themselves thought splits would be advantageous (ER 1012). A split was always within a distributor's "own judgment and discretion" (Montreal dep., ER 1442:11-14. ER 555:17-19; 992, 1012, 1016). At most, Pepperidge Farm sometimes suggested that distributors sell portions of their territories for the purpose of improving service (ER 1631:19-1632-27).

Petitioners do not claim that any of *their own* route splits was coerced, nor can they. Montreal disclaims personal knowledge of why Mesirow and Morris split their routes (ER 1441:1-14). The uncontradicted evidence is that Pepperidge Farm never demanded any Mesirow/Morris route split (ER 583:18-584:19, 585:19-586:16). Mesirow declared that he viewed his Pepperidge Farm franchise as a "honey pot" and that the reason he sold portions of his territory from time to

time was to "finance our extravagant way of living" (Mesirow decl., ER 1068:26-31).

Mesirow paid $10,000 to his predecessor for his Pepperidge Farm franchise, $5,000 of which Pepperidge Farm loaned to him. Morris paid $3,500 for his franchise territory (Mesirow dep., ER 627:24-628:7, 629:14-16; Morris dep., ER 913:21-914:3). In 1973, 10-15% of the original combined territory was sold for $14,000. In 1976, 5-10% of the original territory was sold for $16,500. In 1977, 5-10% of the original territory was sold for $33,000. In 1978, 10-12% of the original territory was sold for $33,000. In 1978, 10-12% of the original franchise territory was sold for $22,000 (ER 1394:22-1395:28; 1397:30-1398:24). Simple arithmetic calculation shows that petitioners realized extraordinary capital gains on each sale:

	Proportional Cost	Gain Realized	Percentage Realized
Sale #1-15%	$2,025	$ 11,975	591%
Sale #2-10%	$1,350	$ 15,150	1122%
Sale #3-10%	$1,350	$ 31,650	2344%
Sale #4-12%	$1,620	$ 30,380	1875%
Sale #5-12%	$1,620	$ 20,380	1258%
TOTALS	$7,965	$109,535	1375%

None of the capital gain was reported in Mesirow's or Morris's tax returns (Mesirow's dep., ER 661:23-24, 662:6-17, 668:17-26, 675:23-677:1, 678:26-679:23, 681:25-682:15, 713:11-714:10, 755:10-756:13, 757:3-28, 817-827, 829-869).

REASONS FOR DENYING THE WRIT

I.

THE PETITION IS BUT ANOTHER ATTEMPT BY MESIROW/MORRIS TO DISTORT AND FALSIFY THE DISCOVERY RECORD.

As a supposed reason for granting the writ, petitioners "urge that there are material issues with respect to the facts found by the appellate court" (Pet. 49). The questions framed by the Petition assume and are based upon asserted facts which both courts below found did not exist on the extensive discovery record.

Generally, "A court of law, such as this Court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944); *Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U.S. 364, 367 (1942); *Baker* v. *Schofield*, 243 U.S. 114, 118 (1917). Additionally, this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

These principles require a denial of the petition, especially because here, as in both courts below, petitioners distort and falsify the extensive discovery record. Such distortions cannot defeat a motion for summary judgment or require review by this Court.

1. Petitioners deliberately falsify portions of the discovery record to which they cite, as at Pet. 47-48 (discussed above at p. 7), violating the duty to in good faith accurately state or summarize pertinent facts. Stern & Gressman, *Supreme Court Practice* (5th ed. 1978), p. 465.

2. "Facts" asserted in the petition repeatedly directly conflict with Mesirow's and Morris's sworn deposition testimony under cross-examination, "the best method yet devised for testing trustworthiness of testimony." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944). Both courts below properly disregarded petitioners' attempts to "raise sham issues" (App. B-11, B-12; App. C-8, C-9). As the Ninth Circuit had earlier held in *Radobenko* v. *Automated Equipment Corp.*, 520 F.2d 540, 543-4 (9 Cir. 1975), adopting the rule in the Second Circuit:

> "When confronted with the question of whether a party should be allowed to create his own issue of fact by an affidavit contradicting his prior deposition testimony, the Court of Appeals for the Second Circuit held that no *genuine* issue of fact was raised. *Perma Research & Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969). Therein the Court noted:

'[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.' 410 F.2d at 578." (Emphasis in original.)

Accord: *Lopez* v. *General Motors Corp.*, 697 F.2d 1328, 1333 (9 Cir. 1983); *Schwimmer* v. *Sony Corp. of America*, 637 F.2d 41, 45 (2 Cir. 1980); *Holifield* v. *Cities Service Tanker Corp.*, 421 F.Supp. 131, 136 (E.D.La. 1976), *aff'd without op.*, 552 F.2d 367 (5 Cir. 1977); *Bryant* v. *Western Elec. Co.*, 572 F.2d 1087 (5 Cir. 1978). *Radobenko* is consistent with a court's inherent power to protect the integrity of the judicial process. See, *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 630-631 (1962); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980).

3. Documentary evidence offered in opposition to a motion for summary judgment must be ignored if not properly authenticated. *Hamilton* v. *Keystone Tankship Corp.*, 539 F.2d 684, 686 (9 Cir. 1976). Mesirow/Morris's attorney attempted to authenticate documents as "from the files of Pepperidge Farm" or "given to me by counsel for Pepperidge Farm" (*e.g.* ER 051:29-31, Keith decl., ER 165:20-166:28, Keith decl., ER 451:21-452:23, Keith decl. ER 1419:26-1420:14). This is not adequate. *United States* v. *Dibble*, 429 F.2d 598, 602 (9 Cir. 1970); N.D. Cal. Rule 220-7.

4. Affidavits and declarations in opposition to a motion for summary judgment must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), F.R.Civ.P. Hearsay, speculation and other incompetent evidence may not be considered. *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 859 (9 Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *McGuire* v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902, 905-906 (9 Cir. 1968); *Schwimmer* v. *Sony Corp. of America*, *supra*, 637 F.2d at 45, n.8; *Kern* v. *Tri-State Insurance Co.*, 386 F.2d 754, 756 (8 Cir. 1967).

5. Unsupported, self-serving testimony is not substantial evidence sufficient to create a jury question. *Comfort Trane Air Conditioning* v. *Trane Co.*, 592 F.2d 1373, 1383 (5 Cir. 1979); *Scott Medical Supply Co.* v. *Bedsole Surgical Supplies, Inc.*, 488 F.2d 934, 937 (5 Cir. 1974).

The Mesirow declarations (ER 059-065; 437-43; 1479-1484) were for the most part hearsay, self-serving conjecture and unsupported opinion. The declaration of Richard B. Montreal (ER 444-450) on its face was a combination of opinion and speculation; its misleading assertions were not made "on personal knowledge," because Montreal severed his connection with Pepperidge Farm in 1971 and does not even purport to have personal knowledge of its practices within the 1974-78 time frame relevant to this lawsuit (Montreal decl. ER 444:25-32). His declaration had no evidentiary value and was properly disregarded. F.R.Civ.P., Rule 56(e); N.D. Cal. Rule 220-7; *MAPCO, Inc.* v. *Carter*, 573 F.2d 1268, 1282 (TECA 1978), *cert. denied*, 437 U.S. 904 (1978); *United States* v. *Dibble supra*, 429 F.2d at 601-602.

If this Court were to undertake a "more-than-diligent search" of the record as the district court did (B-12), it too would find that Mesirow/Morris's "facts" are no more than restated allegations, thoroughly contradicted by Mesirow's and Morris's own sworn testimony or dependent upon bizarre distortions of testimony and unsupported by any competent evidence.

II.

THE NINTH CIRCUIT OPINION WAS CORRECT AND IN CONFLICT WITH NEITHER *SIMPSON* NOR THE FIFTH CIRCUIT

The Ninth Circuit was correct in finding lawful under the Sherman Act Pepperidge Farm's wholesale and retail pricing practices and the manner in which it permitted distributors to divide and sell portions of their exclusive territories.

A. Pepperidge Farm's Wholesale Pricing Practices Were Lawful.

Mesirow/Morris argue that Pepperidge Farm's wholesale pricing practices violated the Sherman Act both during and after Fair Trade. Both courts below properly found no violation on the extensive evidentiary record.

1. During Fair Trade.

Contrary to petitioners' assertion (Pet. 26, 30), *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) did not decide what effect the Fair Trade Laws would have on Union's pricing systems. *See*, 377 U.S. at 24.

Prior to January 1, 1976, the laws of the United States and the State of California permitted a manufacturer to set the wholesale and retail prices of its trademarked products sold by others. 15 U.S.C. § 1 (relevant part repealed by Pub. L. 94-145, 89 Stat. 801 (1975)); 15 U.S.C. § 45(a)(2)-(5) (repealed by Pub. L. 94-145, 89 Stat. 801 (1975)); *Beverage Distributors, Inc. v. Olympia Brewing Co.*, 440 F.2d 21 (9 Cir.), *cert. denied*, 403 U.S. (1971). Accordingly, Pepperidge Farm entered into Fair Trade Agreements with Mesirow and with Morris under which Pepperidge Farm dictated the wholesale price of its trademarked products in so far as the Fair Trade laws permitted (See pp. 14-15, above).

In the district court, Mesirow/Morris argued that Pepperidge Farm had forfeited the protection of the Fair Trade laws by limiting its control to wholesale prices. The district court properly rejected this argument under *General Electric Co. v. Federal Employees' Distributing Co.*, 45 Cal.2d 891, 291 P.2d 942 (1955) (App. B-7, B-8). Mesirow/Morris abandoned the argument in the Court of Appeals and argued there that Pepperidge Farm competed horizontally with its distributors, thereby losing Fair Trade protection under *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), which the Petition does not mention.

McKesson & Robbins did not involve a manufacturer selling product only through distributors, as Pepperidge Farm does and did. McKesson sold to wholesalers for resale, but it

also sold to retailers *through its own employees.* For every sale made by a McKesson employee, a McKesson wholesaler was deprived of its participation in the profit from that sale. Pepperidge Farm sells, and during Fair Trade sold, to retailers only through distributors.

Unlike *McKesson & Robbins,* Mesirow/Morris participated in and realized profit from every sale of Pepperidge Farm product in their territories. There was no competition with Pepperidge Farm of the kind which was found to deprive McKesson of rights under Fair Trade, as The Ninth Circuit correctly held. (App. C-7, C-8)

2. After Fair Trade.

Both courts below found that, since the repeal of Fair Trade, Pepperidge Farm has not violated the Sherman Act by setting the wholesale price of its biscuit products only to those chain stores which request direct billing at a single wholesale price for all deliveries of product to their stores, regardless of which distributor makes the delivery or which store receives it. Petitioners challenge the decisions below as being in conflict with *Simpson* v. *Union Oil Co., supra,* and the Fifth Circuit's *Greene* v. *General Foods Corp.,* 517 F.2d 635 (5 Cir. 1975), *cert. denied,* 424 U.S. 942 (1976).

Simpson holds that where a dealer or distributor bears all the risks of loss on a product, losses against which the dealer must insure, 377 U.S. at 15, the manufacturer may not coercively set the retail price of that product. *Greene* condemned dictation of prices to a purchaser of product who bore the entire risk of the product's loss. In *Simpson* and *Greene,* the dealer was unable to offer the purchaser the option of buying from the dealer at dealer prices.

The decisions below were entirely in harmony with both *Simpson* and *Greene.* The asserted conflict in the decisions arises solely "from differences in states of fact, and not in the application of a principle of law." The petition for a writ of certiorari should consequently be denied. *Wisconsin Electric Co.* v. *Dumore Co.,* 282 U.S. 813 (1930); *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 392-3 (1923);

Keller v. *Adams-Campbell Co.*, 264 U.S. 314, 319-20 (1924). Among the significant factual differences between Pepperidge Farm's marketing practices and those which *Simpson* and *Greene* condemned are:

a. ***Risk of Loss***

The gasoline retailer in *Simpson* bore all risk of loss, except for "specified acts of God," 377 U.S. at 15. In *Greene*, "General Foods [made] no pretense to ownership of the goods that are ultimately sold to the [multiple food service accounts]; it concede[d] that title to these rest[ed] in the independent distributor." 517 F.2d at 657. The distributor bore the entire risk of loss. 517 F.2d at 641.

Unlike the situation in *Simpson* and *Greene*, Pepperidge Farm bore all risk of loss on product consigned to its distributors. It paid all inventory and property taxes; it carried insurance against theft and damage (See pp. 9-11, above). Most significantly, when Mesirow/Morris's warehouse was suddenly and mysteriously emptied by a "theft" in 1975, Pepperidge Farm stood for the entire loss of over $21,000, although insurance reimbursed it for only one-half that amount (See pp. 9-10, above). Pepperidge Farm also shouldered the expense of billing and the risk of non-collection from its direct accounts (See p. 10, above).

Where a manufacturer continues to bear the risk of loss for goods sold on consignment, that manufacturer has the right to specify the price at which its goods can be sold. *Hardin* v. *Houston Chronicle Pub. Co.*, 434 F.Supp. 54 (S.D. Tex. 1977), *aff'd per curiam*, 572 F.2d 1106 (5 Cir. 1978), decided by the Fifth Circuit after *Greene* (upholding consignment sales of newspapers at the publisher's prices where the paper bore the risk of loss):

> "Plaintiffs assert that the new system is an improper consignment system in violation of *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964). However . . . [*t*]*he consignment system in Simpson was invalidated because the economic risk remained with the distributor. Here the economic risk is borne by the Chronicle.*" 434 F.Supp. at 56.

Accord, Loom Crafters, Inc. v. *New Central Jute Mills Co.*, 1971 Trade Cas.¶73,734 at 91,073 (S.D.N.Y. 1971); *Action Towing & Rental* v. *U-Haul Intern.*, 507 F.Supp. 987 (E.D. La. 1981); *Lawrence J. Gordon, Inc.* v. *Brandt, Inc.* 554 F.Supp. 1144, 1150 (W.D. Wash. 1983).

Mesirow/Morris claim only one "risk of loss" in connection with Pepperidge Farm's products, (CR 346, Mesirow decl., 1060:15-18; MM.Br., 25), the "risk of stales," that the product will go out of code (Pet. 49). That is not a risk of loss at all. A consignee has a duty to treat consigned property with ordinary care. *Baugh* v. *Rogers*, 24 Cal.2d 200, 215; 148 P.2d 633, 641 (1944); *Windeler* v. *Scheers Jewelers*, 8 Cal.App.3d 844, 850; 88 Cal.Rptr. 39, 43 (1970). By deliberately over-ordering product known to have limited shelf life and allowing product to remain in their warehouse for over four months without attempting to deliver it to retailers, Mesirow/Morris breached their obligations as consignees (See pp. 12-14, above). Mesirow/Morris have admitted that they could have eliminated their overcode problem through proper ordering and that their overcode returns resulted from incorrect and improper orders they sent to Pepperidge Farm (See pp. 11, 13, above). Other Pepperidge Farm distributors in the San Francisco Bay Area have no overcode returns to speak of and product which does go out of code can be shipped to Pepperidge Farm thrift stores for full credit or sold on the thrift market for a profit, as Mesirow and Morris claim to have done (See p. 11, above).

Moreover, the so-called "risk of stales" has nothing to do with the practice petitioners claim to be unlawful. Mesirow/Morris's overcode product can be traced to sales to Longs, their direct customer, and to product sitting in their warehouse for four months without delivery to any retailer (See pp. 12-14, above). Mesirow/Morris's overcoded product had nothing to do with deliveries to accounts billed by Pepperidge Farm, and cannot be a basis for their claim. *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 499-500 (9 Cir. 1977).

b. *Absence of Coercion*

In *Simpson*, the retailer was coerced by Union Oil to charge nothing but Union Oil prices. In *Greene*, General Foods

sold its products to distributors, which in turn re-sold the product to multiple food service accounts ("MFSA's") and the distributors' own down-the-street accounts. The distributor billed both types of accounts, and had no option but to bill the MFSA's at prices dictated by General Foods. 517 F.2d at 640. The distributors were unable to solicit any MFSA to become their own customer, 517 F.2d at 656, and General Foods re-designated Greene's customers as MFSA's. 517 F.2d at 640.

Pepperidge Farm distributors were free to solicit any account, however large, to be a distributor customer, billed by the distributor at his or her prices (See pp. 5-7 above). Mesirow/Morris's largest customer, the Longs chain, was their own account (See pp. 7-9, above). Pepperidge Farm billed direct at its prices only those chains requesting such a relationship (See p. 5, above). The nature of the relationship was not coerced by Pepperidge Farm; it was chosen by the chain as a condition of doing business (See pp. 5-7, above).

c. ***Promotional and Selling Services***

In *Simpson*, promotional and selling services depended entirely upon the initiative and enterprise of the dealers.

"Greene performed promotional and selling services to MFSA's in his territory." 517 F.2d at 645. "Greene's sales efforts directed toward MFSA's were no different from those directed toward" his own accounts. 517 F.2d at 656. The distributor obtained authorization for sales to MFSA's and bore the day-to-day task of creating and maintaining customer satisfaction with these MFSA's. General Foods' staff was not involved. 517 F.2d at 657-658.

Pepperidge Farm paid for all promotions of its product at its direct billed customers. Mesirow/Morris never paid for a promotion on Pepperidge Farm product delivered to a Pepperidge Farm direct customer (See pp. 6, 10, above).

Sales calls on Pepperidge Farm's direct customers were made by Pepperidge Farm employees, who also surveyed and monitored the customers' stores to assure proper service.

Pepperidge Farm employees attempted to obtain greater product authorization, shelf space and promotions in its direct customer stores. Pepperidge Farm employees trained distributors and distributors' employees to properly service Pepperidge Farm's direct customer stores. Pepperidge Farm employees were available to take over distributors' routes, temporarily as needed, to assure that proper service to Pepperidge Farm direct customer stores was maintained (See pp. 5, 10, above). Mesirow/Morris relied completely upon Pepperidge Farm for information about sales to Pepperidge Farm customer stores in their territory (See p. 10, above). Mesirow testified about these stores:

"Q. Without having visited the stores yourself, do you have any idea whether the shelves in those stores were full of Pepperidge Farm product or not?

"A. Pepperidge Farm visited them quite often.

"Q. Do you have any idea?

"A. No." (CR 345, Mesirow dep., 737:2-7).

d. *Direct Sales*

Simpson was not concerned with customers who choose to be billed and priced by a manufacturer. In *Greene*, product was sold to the distributors, who resold that product to MFSA's 517 F.2d at 641. The distributor billed both MFSA's and "down-the-street" accounts. 517 F.2d at 640.

Pepperidge Farm sold product directly to its customers, billing them itself and assuming all risk of collection (See p. 10, above).

The Fifth Circuit, which decided *Greene*, finds nothing unlawful in a system under which a manufacturer sells directly to its customers at its price and delivers product through distributors paid on commission. In *Hardin* v. *Houston Chronicle Pub. Co., supra, all* customers became direct customers of the Houston Chronicle. Because the paper did the solicitation, billing and collection, these were its customers, receiving product through commissioned deliverymen, lawfully billed at the Chronicle's prices:

"Plaintiffs claim that the effect of the new distribution system is to allow the Chronicle to continue to fix the resale price of the newspapers. There is no question that the

Chronicle under the new system will control the price of the newspapers to the consumer, *but that control is the result of the Chronicle's direct sales. This is not an unlawful restraint on prices.* It is permissible for a publisher, like other manufacturers, to set its prices to those who buy directly from the publisher." 434 F.Supp. at 57.

Other courts agree. *Overhead Door v. Nordpal Corp.*, 1979 Trade Cases ¶62,595 (D. Minn. 1978), at 77,431, distinguishing *Greene*, held that where a manufacturer promotes sales, solicits customers and finalizes terms of sales agreements, the manufacturer can lawfully set the selling price of products delivered to those customers by distributors. There is no *resale* price fixing because there is but a single sale. *See* App. B-6; *Action Towing & Rental v. U-Haul International, supra*, 507 F.Supp. 987.

Similarly, in *Blatt v. Lorenz-Schneider Co., Inc.*, 1980-81 Trade Cas. ¶63,670 (S.D.N.Y. 1980) and 1981-1 Trade Cas. ¶63,982 (S.D.N.Y. 1981), the court held that a manufacturer may lawfully set the price of product delivered to its customers through commissioned independent deliverymen where the manufacturer billed its customers.

The direct billing service provided by Pepperidge Farm was pro-competitive and cannot have violated the Sherman Act, much less have violated the law *per se*. *See, Broadcast Music Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). Pepperidge Farm was able to obtain authorization for its product in certain stores only by offering a direct bill at a given price (See pp. 5-7 above). Thus, Pepperidge Farm's billing practice and service enabled its products to compete against those of other manufacturers.

B. Pepperidge Farm Lawfully Marked Its Products with a Suggested Retail Price.

Pepperidge Farm products are delivered to retail stores with a pre-printed suggested retail price (See p. 15, above). Mesirow/Morris have admitted that retail stores, including Longs, change this price at will and Pepperidge Farm instructed its distributors to carry the necessary equipment to effect any

price change requested by a retail store (See p. 15, above). Morris testified:

"Q. When you sold to Longs, did Longs charge the preticketed price?

"A. No.

"Q. Did you ask them to sell the pre-ticketed price?

"A. Did I ask them?

"Q. Yes.

"A. No.

"Q. You never did?

"A. No. They sell them for—you know, they tell me what they want to sell it for.

"Q. And that's what they have always done?

"A. Right." (CR 345, Morris dep., 946:1-12).

The District Court and Court of Appeals correctly found Pepperidge Farms' suggested prices to have been lawful. (App. B-12; App. C-9). *In re Nissan Antitrust Litigation,* 577 F.2d 910, 916 (5 Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979); *Bailey's Bakery, Ltd.* v. *Continental Baking Co.,* 235 F.Supp. 705, 721-722 (D.Haw. 1964), *aff'd,* 401 F.2d 182 (9 Cir. 1968), *cert. denied,* 393 U.S. 1086 (1969).

C. The District Court Properly Dismissed Mesirow/Morris's Section 2 Claims.

Mesirow/Morris based their Sherman Act Section 2 claims on their price fixing claims, discussed above, and their unsupported assertion that Pepperidge Farm forced its distributors to sell portions of their territories to others (the evidence is discussed above at pp. 15-17), under the purported authority of *Photovest Corp.* v. *Fotomat Corp.,* 606 F.2d 704 (7 Cir. 1979), *cert. denied,* 445 U.S. 917 (1980).[6]

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[6] Petitioners did not claim in the Ninth Circuit nor do they claim here that Pepperidge Farm's grant of exclusive territories was unlawful.

Photovest found Fotomat to have attempted to monopolize a "drive-thru retail photo processing submarket" when, with anticompetitive intent, it saturated the market with company owned stores, reducing the value of franchise stores, which Fotomat could then buy at a reduced price. Unlike *Photovest*, Pepperidge Farm did not add "company stores" to undermine the value of a distributor's territory. Pepperidge Farm had and has no economic incentive to force its distributors to split-off portions of their territories. It did and does have an economic incentive to increase sales of its products in every distributor's territory and to help its distributors maximize their earnings. Many Pepperidge Farm distributors increased sales in their territories by adding trucks. Others chose to split portions of their territories, selling to another distributor at a price and upon conditions set by the seller. The choice was always the distributor's and never the result of coercion by Pepperidge Farm. Petitioners' "splits" were at their own choice and to their handsome profit.

Pepperidge Farm possessed neither the requisite market power nor engaged in the anticompetitive activity necessary to violate Section 2 (App. C-11, C-12).

CONCLUSION

The opinions of the district court and court of appeals are consistent with *Simpson*, with the Fifth Circuit and with Mesirow/Morris's sworn deposition testimony. The Petition for a Writ of Certiorari should be denied, or if granted, the Ninth Circuit should be summarily affirmed.

DATED: July 22, 1983

Respectfully submitted,

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On Behalf of Respondent

APPENDIX

Fair Trade, California

California's Fair Trade law was codified in Cal. Bus. & Prof. Code ¶ 16900, *et seq.* It provided in relevant part:

"§ 16902. *Certain sales contracts declared lawful.*

(a) No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others violates any law of this State by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the vendee or producer require the person to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee." Enacted, Stats 1931, ch. 278 § 1, p. 523. Amended, Stats. 1941, ch. 526 § 1, p. 1838. Repealed, effective 1/1/76 Stats. 1975, ch. 402 § 1, p. 878.

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ELI MESIROW, THOMAS MORRIS,
Plaintiffs,

vs.

PEPPERIDGE FARM, INCORPORATED,
a Connecticut corporation,
Defendant.

No. C-78-1392-MHP

MEMORANDUM DECISION

This action is before the Court on cross-motions for partial summary judgment and motions in limine. Oral argument was heard on June 19, 1981. Plaintiffs complain against Pepperidge Farm, Inc. for violations of § § 1 and 2 of the Sherman Act, 15 U.S.C., and for breach of contract. Defendant counterclaims for breach of contract (causes of action 3 and 5), fraud (cause of action 6) and money due on a rolling account (cause of action 6).[1] Plaintiffs seek summary judgment against defendant on their § 1 antitrust claim and causes of action 4 and 6 of defendant's counterclaim. Defendant in turn seeks summary judgment on plaintiff's antitrust allegations.

Having considered all pleadings, documents and oral argument presented in these cross-motions, the court finds that there remain no genuine disputes of material fact and that summary judgment for defendant is appropriate on the antitrust claims. While the parties manifest disagreement on a number of issues, a careful search of the record reveals that many assertions are not adequately supported by proper evidence or that if a genuine factual dispute exists, it is not over a necessary fact. Further, the court grants summary judgment for

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[1] Defendant's first two causes of action relating to trademark infringement have been dismissed without prejudice.

plaintiffs on the fraud claim and denies it as to the rolling account allegation.

I.

BACKGROUND

Plaintiffs, Mesirow and Morris, distributed Pepperidge Farm products from January 1970 to May 1978 and from April 1970 to November 1978 respectively. During that time, each plaintiff entered into several "Consignment Agreements" with defendant in which they were designated as self-employed, independent businesspersons. During the relevant Fair Trade period, 1974 to January 1976, defendant's contracts with plaintiffs allowed it to set wholesale prices for products distributed by plaintiffs to retailers. Both during the Fair Trade period and after, a dual system of distributor and direct accounts was established. Direct billed accounts were those chain stores (three or more retail stores) for which plaintiffs acted as commissioned deliverypersons. Defendant was responsible for billing the account and received payment directly. Pepperidge Farms employees regularly visited the stores of its chain customers to check on service and arrange promotional displays. Plaintiffs were not to negotiate prices although defendant asserts that plaintiffs were free to solicit these accounts to be their own.[2] The distributor accounts were chain or individual stores serviced and billed by distributors. Defendant's employees did not provide assistance unless requested to do so by the distributor. According to defendant, plaintiffs were free to negotiate prices with these latter accounts. At all times, plaintiffs were responsible for costs of their business operation, delivery of products, and for servicing grocery shelves of all accounts. Further, they were required to absorb the costs for products that had gone over-code. Defendant retained title to the consigned goods until they were placed on retail shelves. Defendant bore the risk of loss or theft of the goods and paid applicable inventory and property taxes.

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[2] While this point is disputed by plaintiffs, they offer no evidence to support their position. Long's Drug Stores and Payless Drugs are examples of "chain" stores that remained distributor accounts. (Def's App. 2, Tierney Decl., Tab L, ¶ 15; *id.* Mesirow Dep., Tab F, 415:10-416:14.)

II.

PLAINTIFFS' SUMMARY JUDGMENT MOTION

Plaintiffs allege unlawful restraint of trade by various means, including vertical price maintenance, conspiring to restrain trade and reservation of exclusive territories. After considerable effort sorting out counsel's theories of antitrust violations, the court finds that plaintiffs' arguments lack merit and that partial summary judgment for plaintiffs on the antitrust claims should be denied.

Per Se Illegality

The backbone of plaintiffs' motion for summary judgment on the antitrust claims is the assertion of a per se vertical price-fixing violation under the authority of *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 84 S. Ct. 1051 (1964) and *Greene* v. *General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942, 96 S. Ct. 1409 (1976).[3] For the reasons set forth below, plaintiffs' per se theory of liability must be rejected.

Simpson v. *Union Oil* involved a "consignment" agreement providing for defendant Union Oil to set the prices at which plaintiff retailer sold gasoline. Title to the consigned gasoline remained with Union Oil until sold by consignee. Union Oil paid all property tax on the gasoline in Simpson's possession. By the terms of the agreement, Simpson was required to carry personal liability and property damage insurance and was responsible for loss of the consigned gasoline in his possession. Simpson received a minimum commission and paid all costs of operation. While recognizing the legitimacy of consignment agreements as a risk-of-allocation device, the Court held that when "a 'consignment' device is used to cover a vast gasoline distribution system, fixing prices through many retail outlets, the antitrust laws prevent calling the 'consignment' an

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[3] Attorney for plaintiffs has had great difficulty clarifying his antitrust claims. The court is preceding on its assumption of what the claims are meant to be. However it is the responsibility of plaintiffs to clearly articulate their claims and set forth in a comprehensible fashion the facts in support. It is not the court's responsibility to create a comprehensible claim out of chaos—a predicament in which another court apparently found itself. *Zoslaw* v. *Columbia Broadcasting System, Inc.*, 1978-2 Trade Cas. ¶ 62.269 (N.D. Cal. 1978).

agency. . ." *Simpson* v. *Union Oil*, 377 U.S. at 21, 84 S. Ct. at 1057. The Court was particularly concerned that a consignee, selling only defendant's brand of gasoline, would be prevented from controlling the important economic factor of gasoline prices while being required to accept the risks and responsibilities of an independent business operation. *See id.* at 21, 84 S. Ct. at 1056-57.

Simpson stands for the proposition that consignment agreements are not to be shielded from application of antitrust principles. Consignment agreements are not to be used to effectuate otherwise improper resale price maintenance. However, the *Simpson* holding is not as firm or far-reaching as plaintiffs suggest. E.g., *see* discussion in *Greene* v. *General Foods Corp.*, 517 F.2d at 652-55.[4] *Cf. Hardwick* v. *Nu-Way Oil Co., Inc.*, 589 F.2d 806, 809 (5th Cir. 1979); *American Oil Co.* v. *McMullin*, 508 F.2d 1345, 1351-52 (10th 1975). *Simpson* is not a holding that may be extended automatically to the wholesale level. Simpson was a retailer of gasoline and the Court refers disapprovingly to "resale price maintenance"—a term of art usually referring to the retail level, not to "resale pricing" as plaintiffs represent. While plaintiffs' attorney may be prescient in discerning the unspoken extent of the Court's concern, this court is unwilling to claim such powers. Plaintiffs' argument on this point is notably deficient in their failure to cite any authority in support of their interpretation.

In addition to the retail-wholesale distinction, the present case involves parties in a significantly different contractual relationship from that in *Simpson*. Plaintiffs here are not

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[4] The court in *Greene* v. *General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942, 96 S. Ct. 1409 (1976) interpreted *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 84 S. Ct. 1051 (1964) as prohibiting devices resulting in resale price maintenance "where the risks of the distribution process are borne largely by numerous otherwise independent individuals or firms in competition with each other in a product for which there is a widespread demand [illegible] individual consumer." *Greene* v. *General Foods Corp* [illegible] e *Greene* court found substantial support for its interpr[illegible] es v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856 (1967) [illegible] the court upheld a finding of per se Sherman Act violations in a vertical territorial restriction scheme. However, the vitality of this suggested trend is seriously undermined by the return to the rule of reason standard enunciated in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 97 S. Ct. 2549 (1977).

restricted to dealing only in the goods of defendant, but in fact act as distributors for a number of other manufacturers. (Def's App. 2, Mesirow Dep., Tab F, 6:11-22, 9:7-11.) While plaintiffs pay most operational expenses of their business, they are not liable for losses of defendant's products even while those products are located in plaintiffs' own warehouse. It is expected that independent business people cover operational expenses of their business. While plaintiffs were required to absorb the "risk of loss" for stale products, this risk was peculiarly within plaintiffs' control. (*Id.* Erdelen Dep., Tab D, 79:17-80:15, 92:2-7; *id.* McGovern Dep., Tab E, 367-68; *id.* Montreal Dep., Tab G, 112:8-21; *id.* Morris Dep., Tab I, 100:14-20.) The overwhelming evidence in the record is that loss of revenue from stale products was and should have been less than two percent for distributors throughout the region.[5] (*Id.* Wilson Dep., Tab K, 35-36, 157-58.) Plaintiffs present evidence that the "volume of stales was high in certain geographic areas where the individual incomes were low." (Plaintiffs' Memorandum of Law in Opposition to Pepperidge Farm's Motion for Summary Judgment, Erdelen Decl., 5:24-25.) However this kind of generalization does little to overcome the specific evidence produced by defendant. Plaintiffs point out that the stale factors of the larger-volume distributors in the area are not included in the record. However, it is incumbent upon plaintiffs to supply that information rather than attempt to support their assertion by an absence of such evidence.

While *Greene* v. *General Foods Corp.* presents facts closer to the present case, it is not dispositive. Greene was an independent distributor of defendant's coffee products who also distributed the products of other manufacturers. Unlike in *Simpson* or the present case, title to all goods passed to Greene at the time he acquired possession. Additionally, Greene bore the risk of loss of those products. Plaintiff's complaint centered around a dual distribution system whereby defendant reserved large institutional accounts (MFSAs) to itself for billing purposes. While Greene solicited and serviced these accounts to

[5] It is difficult to escape the conclusion that plaintiffs' lax business methods did little to reduce the possibility of goods going stale on the shelf. (Def's App. 2, Mesirow Dep., Tab F, 343:20-344:15, 404:22-405:2, 518:28-519:11, 618:1-5; *id.* Morris Dep., Tab I, 86:28-87:12.)

the same extent he did his own, he was not free to negotiate his own price. The MFSA was directed to make its payments to defendant although plaintiff submitted the invoice and received a "delivery allowance" based on the size of the order and credit to his account with defendant for the payments received from the MFSAs.

The court upheld the trial court finding that General Food's distribution system was a per se price-fixing violation. The court found evidence that defendant had gone far beyond a simple announcement of terms and refusal to deal with non-complying independent distributors still permissible under *United States* v. *Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465 (1919). The court noted that Greene was required to shoulder substantially the same risks and responsibilities as he did for his other accounts whose prices he was allowed to negotiate. The court particularly noted that title to the goods passed to Greene at the time he acquired possession. By way of contrast, the court suggested that because of retaining title to its goods, the defendant in *Simpson* "had a greater claim to dictate the price to the consuming public." *Greene* v. *General Foods Corp.*, 517 F.2d at 656-57.

While the distribution system of Pepperidge Farms and of General Foods bear a number of similarities, the distinctions are significant. Plaintiffs in the present case do not acquire title to defendant's goods and are not required to assume the risk of loss. These distinctions are not mere formalities. At one point, plaintiffs reported the loss of a substantial quantity of defendant's goods from their warehouse and were fully credited for the loss.[6] Additionally, defendant bears the risk of non-payment from retailers on the chain-store accounts and is actively involved in the sales process. *See Overhead Door Corp.* v. *Nordpal Corp.*, 1979-1 Trade Cas. ¶ 62,595 at 77,431 (D. Minn. 1978).

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[6] In 1975, plaintiffs reported a loss of and received credit for goods worth $21,386.88. Pepperidge Farms recouped approximately half this amount from their insurer. (Def's App. 2, Silk Decl., Tab O, ¶ 3.)

[7] Therefore the only sale that takes place is between defendant and the retailers and the transactions between defendant and distributors does not involve resale pricing. *See Overhead Door Corp.* v. *Nordpal Corp.*, 1979-1 Trade Cas. ¶ 62,595 at 77,431 (D. Minn. 1978).

In both *Simpson* and *Greene*, the court found that a distribution system involved illegal price-fixing. Plaintiffs seek the same relief here. However each case is distinguishable on its facts, as discussed above. Although the distribution system in *Greene* bears a resemblance to that of Pepperidge Farms, the *Simpson* case provides the closest analogy to the precise issue before us here—whether the economic risks and responsibilities established by a "consignment agreement" so alter the basic nature of consignment as to render the agreement susceptible of an illegal resale price fixing allegation. The material facts surrounding the present "consignment agreement" are not in dispute and the court finds as a matter of law that the distribution system at issue is a valid consignment arrangement.

Fair Trade Period

Plaintiffs argue that during the relevant Fair Trade period, 1974-1976, Pepperidge Farm was not entitled to the protection of the Fair Trade laws, 15 U.S.C. §§ 1, 45; Cal. Bus. & Prof. Code § 16902, because of wholesale price discrimination, retail price-fixing through use of pre-ticketing and engaging in horizontal competition with the independent distributors.

The court is unpersuaded that plaintiffs' complaint of price discrimination is sufficient to deny defendant the protection of the Fair Trade laws. In *General Electric Co.* v. *Federal Employees' Distributing Co.*, 45 Cal.2d 891, 291 P.2d 942 (1955), the court considered a challenge of discriminatory application to fair trade contracts and found that

> parties are left to their discretion as to whether they should enter into fair trade contracts at all, whether they should enter into contracts for the sale of certain commodities and not others, *and apparently whether they should enter into contracts for certain sales of the same commodity and not others.*

Id. at 894 (emphasis added). The facts of that case involved a company making exceptions to its resale contracts for certain

classes of retail purchasers. However the court believes the rationale expressed in *General Electric* is applicable to the present situation and plaintiffs have submitted no authority to dissuade it from that view. Also *see J.W.T., Inc.* v. *Kobrand Corp.*, 1973-2 Trade Cas. ¶74,726 at 94,181 (N.D. Ill. 1973).

Plaintiffs are likewise unpersuasive on the wholesale competition claim. Their reliance on *United States* vs. *McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S. Ct. 937 (1956) is unavailing. In *McKesson*, defendant employed a multitiered distribution system including sales to retailers from its wholesale division and to independent wholesalers through its manufacturing division. Resale prices in each of these relationships were set by McKesson. Independent wholesalers were in direct competition with McKesson's own wholesale division and lost economic advantage from defendant's wholesale operations. In the present case, Pepperidge Farm's distribution system is distinguishable in significant respect. While defendant is involved in direct billing of chainstore accounts, the independent distributors participate in the scheme and stand to profit from increased sales.

Contrary to plaintiffs' assertion, defendant does no mail order business in competition with its distributors. Defendant's parent company owns a separate subsidiary mail order company that sells "specialty items," including Pepperidge Farm cookies, by mail directly to the public. None of these items are sold to wholesalers, distributors or retailers. (Def's App. 2, Tierney Decl., Tab L, ¶17.) Plaintiffs do not raise a genuine dispute of fact. They merely reiterate the facts put forth by defendant and state that these facts raise the question of "whether Pepperidge Farm operates a mail order business." (Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, ¶17.)

Plaintiffs' attempt to show horizontal competition is rejected. There is no evidence that Pepperidge Farm had a wholesale division set up to service and coordinate distribution and sales to retailers as existed in *McKesson*. Plaintiffs and defendant do not stand at the same 'functional level' as one another, *see United States* v. *McKesson & Robbins, Inc.*, 351

U.S. at 313, 76 S. Ct. at 942, and there is no showing of vertical integration. *See Westpoint Pepperell, Inc.* v. *Rea,* 1980-2 Trade Cas. ¶ 63,341 (N.D. Cal. 1980). *See generally* Altschuler, "*Sylvania,* vertical restraints, and dual distribution," 25 Antitrust Bull. 1 (1980).

Rolling Account

Plaintiffs' motion for summary judgment on cause of action six of defendant's counterclaim is denied. Mr. Tierney may have believed that the $30,000 received by defendant for sale of Mesirow's territory was to be credited to plaintiff's account. (Plaintiffs' Motion for Partial Summary Judgment (1/19/81, Tierney Dep.)). However, assuming that Mr. Mesirow's distributorship was terminated with good cause and without improper motive, he no longer had a legal interest in the sale of the territory. *See Noble* v. *McClatchy Newspapers,* 533 F.2d 1081 (9th Cir. 1975), *remanded on other grounds,* 433 U.S. 904, 97 S. Ct. 2966 (1977). If the agreement between plaintiffs and Pepperidge Farm was to credit the franchise sale price to plaintiffs' account, that remains to be shown at trial. Plaintiffs' showing on this part of the motion is insufficient. Exhibit 4 of Plaintiffs' Motion for Partial Summary Judgment has not been properly authenticated and does not specify what time period is affected.

Fraud

Plaintiffs have attempted to show that the reliance element of a cause of action for fraud cannot be shown by defendant. Defendant did not dispute plaintiffs' argument and it is therefore accepted as true by the court for purposes of this motion. Plaintiffs' motion on cause of action four of defendant's counterclaim is granted.[8]

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[8] Plaintiffs have filed two motions in limine. Portions of the 1978 Reny Morris deposition are prejudicial to plaintiffs within the meaning of Fed. R. Evid. 403. However none of the information contained in the deposition is relevant to the issues in this case. This is especially so because plaintiffs' motion for summary judgment on the fraud claim has been granted by the court.

Plaintiffs' motion in limine as to the Dutch Boy Cookies is rendered moot by the court's decision not to address the damages issue.

III.

DEFENDANT'S SUMMARY JUDGMENT MOTION

Defendant asserts that as to the post-Fair Trade period, (1) maintaining direct accounts with established prices was not illegal price-fixing, and (2) that it did not impermissibly coerce distributors or their accounts to adhere to fixed prices. The court agrees with defendant on both issues and therefore grants summary judgment in its favor on the antitrust claims. While summary judgment is not a favored vehicle for resolution of antitrust allegations, its use is not foreclosed and can be "a valuable means to avoid squandering judicial time and resources." *Mutual Fund Investors, Inc.* v. *Putnam Management Co., Inc.*, 553 F.2d 620, 622 (9th Cir. 1977). It is the responsibility of plaintiffs to set forth facts that will support a viable legal theory upon which it can recover. They have failed to do so upon any version of the facts before this court even when reviewed most favorably to them.

Direct Accounts

A manufacturer bearing the economic risks of distributing is permitted to control the resale price of its products without running afoul of price-fixing prohibitions. *See Greene* v. *General Foods Corp., supra; Overhead Door Corp.* v. *Nordpal Corp., supra; Hardin* v. *Houston Chronicle Publ. Co.* 434 F. Supp. 54 (S.D. Tex. 1977), *aff'd per curiam*, 572 F.2d 1106 (5th Cir. 1978). The issue here is whether Pepperidge Farm in practical effect bears the economic risks of distribution or whether a significant share of those risks lie with plaintiffs.

The essentially undisputed facts are that, as to Pepperidge Farm's direct accounts, distributors delivered products, serviced the shelves, and took orders for the direct account customers. (Def's App. 2, Bonesteel Dep., Tab A, 33:7-15). Pepperidge Farm employees also call upon these customers in order to promote sales and arrange for displays. These accounts are billed directly by defendant; distributors receive a percentage of defendant's wholesale prices as a commission. Pepperidge Farm bears the risk and expense of billing the direct customers. (See discussion *infra*.) Chains may choose to require direct billing. (*Id.* Carhuff Dep., Tab B, 185-86.)

While the distributor's role here involves greater participation than in some of the cases cited by defendant, plaintiffs have failed to articulate any specific economic risks they are forced to bear as a result of the direct-account distribution system. The risk of stale products is a risk beyond the usual consignment responsibility of properly caring for the consigned product. However, as mentioned earlier, this responsibility does not create the kind of economic risk associated with a finding of impermissible price controls.

Distributor Accounts

Plaintiffs argue that although they should have been able to negotiate their own prices on the distributor accounts, in fact defendant used various methods to render this freedom illusory. Defendant relies on the factual record to show that no coercive tactics were employed. Plaintiffs argue that at the least, material questions of fact remain for trial. Keeping in mind the restricted role of summary disposition, the court is unable to find genuine issues of material fact. On close examination, much of plaintiffs' record can be reduced to unsupported assertions, improper attempts to alter or ignore sworn deposition testimony, or factual distinctions without substantive impact. Particularly, the court finds that plaintiffs failed to controvert defendant's showing of permissible conduct. Defendant provides evidence that its policy was to stop directing wholesale prices to distributor accounts after 1976. (Def's App. 2, Dundon Dep., Tab C, 216:20-218:20; *id.* Mesirow Dep., Tab F, 425:19-426:6.) Plaintiffs have not produced legally sufficient evidence from which the court can find a pattern of coercion in the setting of wholesale prices. *See Mutual Fund Investors, Inc.* v. *Putnam Management Co., Inc., supra,* 553 F.2d 620; *Westpoint Pepperell, Inc.* v. *Rea,* 1980-2 Trade Cas. at 75,744.

Plaintiffs rely heavily on their assertion that Pepperidge Farm sent price lists to distributor chain accounts as a means of controlling wholesale prices. In support of this claim, plaintiffs submit one piece of hearsay testimony. (Def's App. 2, Mesirow Dep., Tab F, 426:7-22.) This evidence is not sufficient to create a genuine factual dispute against the showing by defendant that the policy and practice of Pepperidge Farm was to send such

lists only to its direct chain accounts. (*Id.* Dundon Dep., Tab C, 283:8-27.) One former district sales manager stated that from 1968 to 1971 he delivered Pepperidge Farm price lists to non-chain accounts "when requested." (Dec. Montreal in Support of Plaintiffs' Motion for Summary Judgment, 6:27-30.) Again, such an assertion is vague and not relevant to claims arising between 1974 and 1979.

Even assuming that such evidence was sufficient, plaintiffs admit that they never attempted to charge Long's a price (1977), from that used by Pepperidge Farm for its direct accounts. (*Mesirow Dep., supra,* Tab F, 421:18-422:4.) Plaintiffs have made no showing that the price negotiations between plaintiffs and its own chain accounts were not the result of those parties' respective bargaining power.

As to the pre-ticketing allegation, defendant has submitted evidence that in spite of its practice of pre-ticketing its products, retailers may initiate a change in prices. (Def's App. 2, Morris Dep., Tab I, 133:1-12; *id.,* Tab J, Tierney Dep., 385-86; *id.,* affidavits of defendant distributors, Tabs R-CC, ¶ 7.) Plaintiffs have submitted no proper evidence to contradict defendant's showing and thus there is no genuine issue of fact.[9]

Distributor Territories

Plaintiffs argue both that defendant impermissibly required exclusive territories and that it coerced distributors to split their routes in order to maintain price controls.

Territorial restraints must be judged under a rule of reason as to whether they create a substantially adverse effect on interbrand competition in the relevant market. *See Continental*

[9] It is not inconceivable that such evidence does exist somewhere in the record. But after a more-than-diligent search, the court is unable to discern any. As with many evidentiary issues in this action, plaintiffs' papers are a jumble of incomplete cross-references and unsupported assertions. For instance, plaintiffs' attorney states "Pepperidge Farm's pre-printed retail prices are not suggested at all, but are firmly in place printed prices which establish a ceiling on a distributor's ability to negotiate prices and profit margins with retailers." (Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, 14:7-10.) Such an assertion fails to meet the most minimum standard for presenting proper evidence to raise a disputed issue of fact on a motion for summary judgment.

T.V., Inc., v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549 (1977), *overruling United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856 (1967); *Cowley* v. *Braden Industries, Inc.*, 613 F.2d 751 (9th Cir.), *cert. denied*, 446 U.S. 965, 100 S. Ct. 2942 (1980).

In *Cowley* v. *Braden Industries*, the court upheld the trial court's findings that defendant's near-exclusive territory restrictions did not harm interbrand competition. *Id.* at 755. Defendant represented approximately 70% of the nation's windmill market. The appellate court held that plaintiff failed to meet its burden of proving that defendant's vertical territorial restriction was unreasonable. As in *Cowley*, defendant has submitted evidence that requiring exclusive territories was necessary for assuring active interbrand competition. (Def's App. 2, Tierney Decl., Tab L, ¶ 8.) Defendant bolsters its argument of encouraging competition by presenting evidence that plaintiffs preferred to acquire exclusive territories. (Def's App. 2, Mesirow Decl., Tab F, 17:27-18:7, 725:21-25.) While the legality of territorial restrictions does not depend on whether the restriction is initially attractive to distributors, the preference of plaintiffs for exclusivity does lend support to defendant's (and distributors') position in the relevant market. The desire to obtain and maintain an exclusive distributorship is a legitimate goal and does not, without more of a showing, suggest any forbidden anticompetitive motive. *See Westpoint Pepperell, Inc.* v. *Rea*, 1980-2 Trade Cas. at 75,744.

Plaintiff relies solely on *Industrial Building Materials, Inc.* v. *Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970) for its argument that Pepperidge Farm's dominant market position requires denial of defendant's motion for partial summary judgment. In *Industrial Building Materials*, defendant, a dominant manufacturer of sealing products, was accused of driving plaintiff out of business through unlawful means including distribution of its own products. The court relied heavily on the fact that even if defendant did not hold a monopoly position in the sealant industry, it was at least a strongly dominant factor.

Defendant here asserts that its United States market share for biscuit products (cookies and crackers) is between three and four percent.[10] Plaintiffs object to the inclusion of crackers in the definition and percentage calculation of the relevant product market. (Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, 3:23-27.) However they offer no evidence to support this claim or statistics showing defendant's percent of the cookie market. Plaintiffs contend that Pepperidge Farm is a monopoly or dominant power in the "premium cookie industry." (Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment, Exh. 1, Patch Dep., 60:7-20.)[11] The distinction between cookies "made with top quality ingredients" and cookies of more pedestrian quality may be susceptible of subjective taste but it is not susceptible of objective evaluation. The relevant market is not to be defined by advertising slogans and plaintiffs have submitted no authorities to help in this process. For instance there is no attempt to show that this distinction falls outside the standard of "commodities reasonably interchangeable by consumers for the same purposes. . . " *ALW, Inc.* v. *United Air Lines, Inc.*, 510 F.2d 52, 56 (9th Cir. 1975), citing *United States* v. *E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 395, 76 S. Ct. 994, 1007 (1956).

In *Industrial Building Materials,* defendant clearly held a dominant market position *and* was alleged to have driven its major independent distributor out of business. The court noted that this combination of factors resulted in a foreclosure of competition and was an unreasonable restraint of trade. *Industrial Building Materials,* 437 F.2d at 1342-43. We are not faced here with the special circumstances of that case. There is no

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[10] In 1980, defendant's share of the U.S. biscuit market was 3.64%; its share of the San Francisco market was 3.2%. The respective 1975 shares were less than 3% and less than 2.5%. (Def's App. 2, Tierney Decl., Tab L. ¶ 7.)

[11] Plaintiffs' Opposition to Defendant's Statement of Undisputed Facts, states "[i]t is further demonstrated that Pepperidge Farm is a dominant company in the sale of dessert and party cookies, as distinguished from crackers. See, Declaration of Maxwell Keith, Exh. 1 herein." Aside from the fact that "Exh. 1 herein" is inexcusably imprecise, this factual assertion simply distorts and exaggerates the testimony of one Safeway manager (taken in Utah) that to his knowledge Pepperidge Farm is the only company that makes a "premium" cookie. It appears that the deponent worked at a San Francisco Safeway division between 1972 and 1975 but no proper foundation was laid clarifying that point.

evidence that Pepperidge Farm is a dominant factor in the relevant market; there is no allegation that defendant planned to reduce competition by eliminating distributors; and defendant did not engage in horizontal competition as a means of driving its major distributor out of business. "The intent of [defendant] is not at issue. Rather the issue is whether plaintiff has alleged any facts demonstrating a violation that "fits" within the requirements for an antitrust recovery, a question of law that can be answered by the court." *Lupia* v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1166 (7th Cir. 1978), *cert. denied*, 440 U.S. 982, 99 S. Ct. 1791 (1979).

Pepperidge Farm admits that its economic interests are served not only by an increase in sales of its products, brought about by route expansion, but also by quality service to existing accounts, sometimes brought about by route splitting. Plaintiffs argue that defendant impermissibly encouraged route splits to prevent the formation of powerful distributors and to maintain control over resale prices. Evidence presented by plaintiffs to demonstrate improper motive shows only that defendant encouraged its managers to induce route splits. (Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment, Exh. 6, Montreal Dep., 49-57, 78-79; *id.*, Erdelen Decl., 2:16-20, 7:16-29.) Defendant provides support for its assertion that suggesting or encouraging route splits was done for the legitimate purpose of improving service. (Def's App. 2, Dundon Dep., Tab C, 307:18-308:19, 315:19-316:16; *id.*, Tierney Dep., Tab J, 267.) Alleging improper motives is not by itself sufficient to raise a genuine dispute of fact or to adequately support a reasonable inference in plaintiffs' favor. There is deposition testimony from a former Pepperidge Farm territorial sales manager (whose position with defendant is not properly established in plaintiffs' exhibit) that pressure was put on him to get a route split from one of the distributors because the distributor was becoming "too successful." (Montreal Dep., Exh. 6, *supra*, 51-56, 61-66.) However this incident occurred in 1970 and the same deponent testified that such conduct was exceptional. Mr. Montreal reiterated the testimony of others that the major concern in route splits was encouraging distributors to improve service.

While the burden of proof is not on plaintiffs to demonstrate the existence of a material issue of fact, once defendant has made a showing of understandable and legitimate business practices, plaintiffs must come forward with specific facts showing that there remains a genuine issue for trial. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-90, 88 S. Ct. 1575, 1592-93 (1968); *Blair Foods, Inc.* v. *Ranchers Cotton Oil*, 610 F.2d 665, 672 (9th Cir. 1980). This they have not done after ample opportunity to do so but have relied on a record lacking significant probative evidence to support their factual contentions or connect these contentions to plausible legal theories.

Section 2 Claim

The elements of a § 2 claim for attempt to monopolize are "(1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success." *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.*, slip. op. 3917 (9th Cir. Aug. 7, 1981). Although defendant's motion on the § 2 claim could have been more clearly enunciated in its moving papers, the record is sufficient to dispose of this claim as well. Plaintiffs rely on the substantive allegations of their § 1 claim to demonstrate predatory or anticompetitive conduct. The court's findings with regard to the § 1 claim apply to the § 2 claim and lead to the conclusion that anticompetitive conduct has not been shown. Additionally, while not indispensable, market power is a relevant factor in determining probability of success. *Blair Foods, Inc.* v. *Ranchers Cotton Oil*, 610 F.2d at 669. As discussed earlier, plaintiffs' unsupported assertions do not withstand summary disposition of that issue. Even under the "short-cut method" of this circuit enunciated in *Gough* v. *Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S. Ct. 1280 (1979), plaintiffs would need to present sufficient evidence of predatory conduct. Plaintiffs having failed in this showing, the court finds that no purpose would be served by going to trial on the § 2 claim and

therefore grants summary judgment to defendant on plaintiffs' allegation of attempt to monopolize trade.[12]

For all of the above reasons, the court denies plaintiffs' motion for summary judgment on the antitrust claims and the rolling account, and grants the motion as to the fraud claim. Further, the court grants summary judgment to defendant on the various antitrust claims. Parties are to prepare for trial only on the breaches of contract and rolling accounts claims.

DATED: August 31, 1981

MARILYN HALL PATEL
UNITED STATES DISTRICT COURT JUDGE

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[12] Because the court has determined that no anticompetitive behavior has been shown, it is unnecessary to decide the issue of damages and the court declines to do so.

United States Court of Appeals

FOR THE NINTH CIRCUIT

January 25, 1983

ELI MESIROW AND THOMAS MORRIS, *Plaintiffs-Appellants*, vs. PEPPERIDGE FARM, INC., a Connecticut corporation, *Defendant-Appellee*.	No. 81-4471 (N.D. Cal. No. C-78-1392 MHP) OPINION

Appeal from the United States District Court
For the Northern District of California
Honorable Marilyn Hall Patel, District Judge, Presiding
Argued and Submitted September 14, 1982

Before: DUNIWAY, FLETCHER and BOOCHEVER, Circuit Judges

DUNIWAY, Circuit Judge:

Plaintiffs Eli Mesirow and Thomas Morris appeal from the district court's dismissal on summary judgment of their claims against Pepperidge Farm, Inc., under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. They also ask us to review two orders imposing fines on their counsel during discovery. We affirm the dismissal of the antitrust claims, and decline to review the discovery sanctions for lack of jurisdiction.

I.

Facts.

Plaintiffs distributed Pepperidge Farm biscuits, cookies and other products from January 1970 to May 1978, and from April 1970 to November 1978, respectively. The terms of the relationship between plaintiffs and Pepperidge were set down in "consignment agreements" that designated the distributors as self-employed independent businesspersons. The agreements established a dual system of accounts for Pepperidge distributors, including plaintiffs: chain stores of three or more retail stores billed directly by Pepperidge, and chain or individual stores that distributors billed. Pepperidge employees regularly visited the stores of its direct-billed accounts to check on service and arrange promotional displays, but distributors such as plaintiffs actually delivered and installed the Pepperidge Farm products in these stores, as they did in the other stores. In all cases, Pepperidge retained title to the goods until they reached the retailers' shelves. Accordingly, it bore the risk of loss or theft of the goods, even while they were in the hands of the plaintiffs. It also paid applicable inventory and property taxes on the goods.

Both during the relevant Fair Trade period and after, Pepperidge set the wholesale prices to be charged direct-billed customers, which paid Pepperidge directly; plaintiffs were forbidden to negotiate different prices with them. Plaintiffs were free, however, to solicit these customers to be their own. Plaintiffs set wholesale prices for their own accounts, which included both chain and individual stores. Pepperidge employees did not help on these accounts unless plaintiffs asked them to do so.

Pepperidge gave each of its distributors, including plaintiffs, the exclusive right to solicit and sell to stores within a specific geographical territory. Though distributors were thus prohibited from selling to retailers outside their territories, they were permitted to, and plaintiffs did, within those areas, distribute other manufacturers' goods in addition to Pepperidge's. Distributors paid their own operating costs of deliveries to the customers Pepperidge billed directly as well as to their

own customers. In addition, they were required to absorb the cost of products that went stale while sitting in their warehouses or on retailers' shelves in their territories.

Plaintiffs, who are step-brothers, operated their Pepperidge distributorships jointly. They several times "split" their territories by selling to others the right to deliver Pepperidge Farm products within portions of those areas. Pepperidge terminated Mesirow's franchise for cause in May 1978. Morris sold his franchise later that year.

Plaintiffs' complaint alleged that Pepperidge violated §§ 1 and 2 of the Sherman Act both during and after the Fair Trade period, and breached its contracts with plaintiffs. Pepperidge counterclaimed, alleging trademark infringement, breach of contract, fraud and money due on rolling account. On cross motions for summary judgment, the trial court dismissed plaintiffs' antitrust claims, and entered judgment under F.R. Civ. P. 54(b). Plaintiffs filed a timely appeal from that judgment. The notice refers only to "the judgment entered pursuant to Fed. R. Civ. P. 54(b) . . . on September 4, 1981."

II.

The Antitrust Claims.

A. Pepperidge Farm Accounts: Post-Fair Trade Period.

Plaintiffs first contend that Pepperidge's practice, after the repeal of Fair Trade laws, of fixing the wholesale prices charged its direct-billed customers was a *per se* violation of § 1 of the Sherman Act as defined by *Simpson v. Union Oil Co. of California*, 1964, 377 U.S. 13, 84 S. Ct. 1051, 12 L.Ed.2d 98. That case held a purported "consignment" arrangement between an oil company and a retailer illegal because it prohibited the retailer from setting its own resale prices for the oil company's product.

Simpson, however, does not outlaw every consignment arrangement. There is "nothing illegal" about a system in which an owner of an article sends it to a dealer who undertakes to sell it only at a price determined by the owner.

377 U.S. at 21. Three factors distinguish the Pepperidge consignment agreement at issue here from the Simpson arrangement: the agreement here set wholesale, not retail prices; Pepperidge, not the plaintiffs, bore the greater burden of risk during the consignment period; and the arrangement did not coerce the plaintiffs as the Simpson contract did. We need not decide here whether any of these factors alone would prevent application of the *Simpson* rule to the consignment agreement here. Together, they bar a finding that the Pepperidge agreement was *per se* illegal.

1. Wholesale price fixing.

Simpson was a retailer of the defendant oil company's products. Plaintiffs were wholesale distributors of Pepperidge products. The trial court concluded that Simpson is not a holding that may be extended automatically to the wholesale level," and we have been unable to find express authority to the contrary.

Plaintiffs argue that *Greene* v. *General Foods Corp.*, 5 Cir., 1975, 517 F.2d 635, supports the application of *Simpson* to a wholesale distributorship. Plaintiff Greene in that case distributed coffee goods to "large institutional buyers" such as motel chains. *Id.* at 639, 642 n.4 But the court clearly assumed that he was a retailer, not a wholesaler. *Id.* at 652. We have once considered applying *Simpson* to a contract between a producer and wholesalers. In *Westinghouse Electric Corp.* v. *CX Processing Laboratories, Inc.*, 9 Cir., 1975, 523 F.2d 668, a wholesale distributor alleged *per se* antitrust violations in the form of vertical price fixing by a manufacturer. Citing *Simpson*, we affirmed the dismissal of the claim for lack of evidence. 523 F.2d at 674. *See also American Oil Co.* v. *McMullin*, 10 Cir., 1975, 508 F.2d 1345, 1351-1352, affirming a judgment against a bulk distributor of oil products that had charged a producer with *Simpson* violations. In neither case did the court specifically decide whether *Simpson* could bar a consignment agreement involving a wholesaler instead of a retailer. Thus, we are not prevented from holding that the wholesale context of the agreement in the case before us is at least a factor in immunizing Pepperidge from *Simpson* illegality.

Language in *Simpson* itself supports such a conclusion. As the trial court noted, the Court in that case repeatedly used the term "resale price maintenance," which is a term of art usually referring to the retail level. At one point, the Court explicitly stated: "Nor does § 1 of the Sherman Act tolerate agreements for *retail* price maintenance." 377 U.S. at 18 (emphasis added). Plaintiffs attempt to represent the *Simpson* holding as a ban on "resale pricing," but there is nothing in that opinion, which speaks, e.g., of a "retail merchant," 377 U.S. at 18, and "retail sales," *id.* at 21, to directly support its application to wholesalers.

2. Allocation of Risk.

Another factor in our decision is the significantly greater risks borne by Pepperidge than were borne by the defendant in *Simpson.* The *Simpson* Court reviewed various "indicia of entrepreneurs," 377 U.S. at 20, possessed by the plaintiff there, concluding that Simpson was in fact an independent businessman burdened illegally by his contract with defendant. Here, however, the risk of entrepreneurship with regard to the direct-billed accounts falls mainly on Pepperidge.

In *Simpson*, although the defendant paid property taxes on the goods and retained title to them until they were finally sold by the retailer Simpson, the retailer was liable for losses or damage to the product while it was in his possession, and was required to insure against such loss. 377 U.S. at 15. Plaintiffs were not burdened with the risks and responsibilities imposed on Simpson. Title to the baked goods remained with Pepperidge until delivery to a retailer—and so did liability for losses and damage. Pepperidge, not plaintiffs, purchased insurance against such risks. Although plaintiffs, like Simpson, were responsible for their own operating costs and received a commission on deliveries, Pepperidge was liable for the risk and expense of billing the customers. Plaintiffs make much of their own liability for stale goods, a risk that the trial court found to be "beyond the usual consignment responsibility of properly caring for the consigned product." We do not find incorrect her conclusion that as the risk of stales was one peculiarly within plaintiffs' control, it was not sufficient to make the arrangement *per se* illegal.

Plaintiffs' reliance on *Greene* v. *General Foods Corp., supra,* on this issue is misplaced. The court in that case found that the defendant had engaged in conduct *per se* illegal under *Simpson,* but the agreement's allocation of the risks of the arrangement was far different from the allocation in the Pepperidge agreement. In *Greene,* plaintiff distributor purchased the goods from defendant manufacturer and resold them. 517 F.2d at 640-641. The distributor held title to the goods and bore the risk of loss or damage to them until they were delivered to his customers. *Id.* The distributor also was responsible for billing the accounts, although the manufacturer bore the risk of default on credit sales. *Id.* Finally, the distributor was charged with promoting the goods and performing the day-to-day tasks necessary to maintain customer satisfaction. *Id.* at 657-658. As we have noted, Pepperidge, in the agreement with plaintiffs, retained title to the consigned goods and bore the risk of loss or damage to them. The goods were consigned to the distributors, not sold to them. In addition, Pepperidge, not the distributors, promoted the goods to the direct-billed accounts and had the sole responsibility of routinely servicing those accounts. And unlike the plaintiffs in *Greene,* Pepperidge's distributors were free to solicit the direct-billed accounts to be their own.

3. Coercion.

The third factor that distinguishes the consignment arrangement at issue here from that in *Simpson* is the absence of coercion in the Pepperidge agreement. *Simpson* held that "a supplier may not use coercion on its retail outlets to achieve price maintenance. . . . [I]t matters not what the coercive device is." 377 U.S. at 17. The vice of the consignment in issue there was that it "coercively laced [dealers] into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive." 377 U.S. at 21. The agreement bound Simpson so tightly that it took from him his "only power" to be a wholly independent businessman—the power to set his retail price. *Id.*

Plaintiffs are unable to demonstrate such coercion here. The *Simpson* Court was concerned with preventing a producer from curbing competition among the sellers of a single brand of product. Here, on the contrary, the evidence shows that Pepperidge distributors were free to solicit the producer's customers to be their own. They were not necessarily bound, therefore, to sell to retailers at prices specified by Pepperidge.

In view of these three factors, therefore, we affirm the trial court's dismissal of plaintiffs' § 1 *per se* claim covering the post-Fair Trade period.

B. Pepperidge Farm Accounts: Fair Trade Period.

Plaintiffs also challenge the legality of Pepperidge's consignment agreements during the Fair Trade period, from June, 1974 through March, 1976. These agreements set the prices at which distributors sold Pepperidge goods to retailers.

Before 1976, federal law permitted fair trade agreements in which producers set resale prices for their goods. 15 U.S.C. § 1 (relevant part repealed by Pub. L. 94-145, 89 Stat. 801 (1975)); 15 U.S.C. § 45(a)(2)-(5) (repealed by Pub. L. 94-145, 89 Stat. 801 (1975)). Plaintiffs, however, argue that the Pepperidge agreements were illegal because they fixed prices horizontally, in violation of 15 U.S.C. §§ 1 and 45(a)(5), which, before the 1975 amendments, prohibited fair trade agreements "between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." They contend that when Pepperidge set wholesale prices, it competed with its distributors, "who also had potential to set a wholesale price."

Plaintiffs' contention is not, as they claim, supported by *United States* v. *McKesson & Robbins, Inc.*, 1956, 351 U.S. 305. The Court in that case held that §§ 1 and 45(a) did not exempt from antitrust prohibitions an agreement between a producer and a distributor who in fact competed against each other. Defendant manufacturer in *McKesson* sold goods under Fair Trade agreements both to independent distributors and to retailers. As a wholesaler, it competed directly, therefore, with the independent distributors on whom it imposed price restric-

tions. Pepperidge, on the other hand, sold only through its distributors, who, as the trial court found, profited from all Pepperidge sales, even those that Pepperidge directly billed.

The trial court also found that Pepperidge did no mail order or retail business in competition with its distributors, and plaintiffs have directed our attention to no evidence to the contrary. Pepperidge therefore did not compete "at the same functional level" with its distributors, *McKesson*, 351 U.S. at 313. As a result, summary judgment for Pepperidge on the antitrust claim covering the Fair Trade period was proper.

C. Pepperidge Farm Accounts: Interim Violations.

Plaintiffs complain that the trial court did not respond to their claim that Pepperidge's practice of setting wholesale prices for its direct-billed customers between March 1976, when Fair Trade ended, and May 1977, when Pepperidge consignment agreements were signed, violated §1 of the Sherman Act. Though the trial court's decision did not discuss the interim allegations specifically, it dismissed them along with plaintiffs' other antitrust claims. We affirm because we find nothing improper in Pepperidge's conduct after the repeal of Fair Trade.

D. Distributors' Accounts.

Plaintiffs argue that although Pepperidge claims that distributors were free to set the prices they charged all customers other than those the manufacturer billed directly, Pepperidge used various methods to render that freedom illusory. For example, they refer to a type of account they term a "hybrid direct chain account," in which, they say, the distributor billed at prices set by Pepperidge. But plaintiffs' contention that distributors were not free to set prices for their own accounts is set forth only in Mesirow's declaration filed in opposition to

Pepperidge's motion to dismiss. It directly contradicts Mesirow's own earlier deposition testimony that he "always" priced products he sold to stores he billed directly at amounts different from any price that Pepperidge might have specified. Mesirow's conflicting statements do not create a factual dispute sufficient to avoid summary judgment. They raise sham issues. *Radobenko* v. *Automated Equipment Corp.*, 9 Cir., 1975, 520 F.2d 540, 544.

Plaintiffs also say that Pepperidge sent price lists to distributors' customers as a means of controlling wholesale prices. But the one relevant piece of evidence they submitted is hearsay, and insufficient to create a genuine factual dispute because it was not made on personal knowledge. F.R. Civ. P. 56(e). Plaintiffs further argue that Pepperidge controlled its distributors' wholesale prices by pre-printing a suggested retail price on the packages of its baked goods. But they have not contradicted Pepperidge's showing that retailers could change the pre-printed prices. By itself, the pre-printed price did not violate antitrust restrictions. *Bailey's Bakery, Ltd.* v. *Continental Baking Co.*, D. Hawaii, 1964, 235 F. Supp. 705, 722, *aff'd*, 9 Cir., 1968, 401 F.2d 182.

E. § 2 Claims.

Plaintiffs also assign the trial court's dismissal of their claims that Pepperidge monopolized and attempted to monopolize, in violation of § 2 of the Sherman Act as error. They apparently base their § 2 allegations on the price-fixing claims discussed above and on Pepperidge's practice of encouraging the division of distributors' sale and delivery territories into smaller geographical areas.

1. Monopolization.

Monopoly power in the relevant market is one of the three essential elements of § 2 monopolization. *Forro Precision, Inc.* v. *International Business Machines Corp.*, 9 Cir., 1982, 673 F.2d 1045, 1058. The trial court found that Pepperidge was not a dominant factor in the relevant market. Plaintiffs argue that the judge's finding should be overturned because she failed to consider the proper submarkets. But the relevant market is a

question of fact, and the trial court's finding should not be overturned unless it is clearly erroneous. *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 9 Cir., 1982, 676 F.2d 1291, 1299. We do not find it clearly erroneous.

2. Attempted monopolization.

Specific intent and anticompetitive conduct are essential elements of a claim of attempted monopolization. *Forro, supra*, 673 F.2d at 1059. Here, plaintiffs tried to prove the required specific intent with evidence of Pepperidge's anticompetitive conduct. *See id.; California Computer Products, Inc.* v. *International Business Machines Corp.*, 9 Cir., 1979, 613 F.2d 727, 736-737. Where there is no proof of market power, however, the conduct to support an inference of specific intent to monopolize should be of a kind clearly threatening to competition or clearly exclusionary. *Forro, supra*, 673 F.2d at 1059. Plaintiffs' claims fall far short. We disposed of their price-fixing claims above. As to the splits of territory, as the trial court found, they showed only that Pepperidge encouraged its managers to promote such divisions of distributors' territories. Pepperidge introduced evidence showing the legitimate intent and effects of such conduct, and plaintiffs offered no relevant evidence to contradict that conclusion. Their citation to *Photovest Corp.* v. *Fotomat Corp.*, 7 Cir., 1979, 606 F.2d 704, is not in point because there the franchisor solicited its francisee's customers for itself. Here, other distributors are the beneficiaries of route splits.

III.

Discovery Sanctions.

Finally, plaintiffs ask us to review the discovery sanctions totaling \$750 assessed against their counsel. Counsel was ordered to pay \$250 in expenses and attorneys' fees following denial of a motion to compel production of documents, and \$500 when the trial court denied a request to redepose, after the close of discovery, a Pepperidge employee who had since been discharged from his job.

Leaving aside the question of whether our jurisdiction is proper in view of the fact that plaintiff's notice of appeal did not mention the discovery sanctions, we lack jurisdiction for another reason. An order imposing a sanction upon counsel, a non-party, is final and appealable by the person sanctioned, when imposed. *Reygo Pacific Corp.* v. *Johnston Pump Co.*, 9 Cir., 1982, 680 F.2d 647, 648; *Liew* v. *Breen*, 9 Cir., 1981, 640 F.2d 1046, 1048. No such appeal was taken. The order imposing the $250 fine was filed June 23, 1980; the order imposing the $500 fine was filed March 16, 1981. Plaintiffs' notice of appeal was not filed until September 10, 1981. We note that in both *Reygo Pacific Corp.* and *Liew*, *supra*, the appeal was by the non-party who was sanctioned. Assuming, without deciding, that the client can appeal from an order imposing a sanction on his attorney, the appeal is too late. F.R. App. P. 4(a). Therefore, we lack jurisdiction to consider the validity of the sanctions.

The judgment appealed from is affirmed.

FILED
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PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

MESIROW v. PEPPERIDGE FARM	No. 81-4471

BOOCHEVER, Circuit Judge, concurring.

I would not address the issue of whether an attorney in a case may wait until final judgment to appeal sanctions imposed during the earlier course of proceedings. We have permitted attorneys to file appeals within thirty days from the entry of orders imposing such sanctions. *Reygo Pacific Corp.* v. *Johnston Pump Co.*, 680 F.2d 647, 648 (9th Cir. 1982); *Liew* V. *Breen*, 640 F.2d 1046, 1048 (9th Cir. 1981); until now, we have never ruled on whether the attorney's appeal may also be joined with that of the party at the conclusion of the case. There are strong policy reasons against piecemeal appeals which weigh in favor of encouraging the joinder of the attorney's appeal with that of his client.[1] I believe, however, that we have no jurisdiction to resolve the issue at this time.

There were multiple claims and counterclaims filed in this case. On September 4, 1981, the trial judge ruled only on plaintiff's antitrust claims and entered judgment under Fed. R. Civ. P. § 54(b) as to those claims alone. Moreover, the notice of appeal refers only to "the judgment entered pursuant to Fed. R. Civ. P. § 54(b) . . . on September 4, 1981." Thus, our jurisdiction is limited to review of those antitrust claims and we have no authority to consider the appeal from imposition of sanctions.

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[1] *Eastern Maico Distributors, Inc.* v. *Maico-Fahrezeugfabrick*, 658 F.2d 944 (3d Cir. 1981). *See also* C. Wright, A. Miller, C. Cooper 15 *Federal Practice and Procedure*, § 3911, 498-99 (1976).